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Justices C
42
REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

ROBERT G. MORROW

REPORTER

VOLUME 45

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1905

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OF THE
SUPREME COURT

DURING THE TIME OF THESE DECISIONS.

FRANK A. MOORE - - - CHIEF JUSTICE
CHARLES E. WOLVERTON - ASSOCIATE JUSTICE
ROBERT S. BEAN - - - ASSOCIATE JUSTICE

ANDREW M. CRAWFORD - ATTORNEY-GENERAL
ROBERT G. MORROW - - - REPORTER

JOHN J. MURPHY - - - CLERK AT SALEM
ARTHUR S. BENSON - - DEPUTY AT SALEM
LEE MOOREHOUSE - DEPUTY AT PENDLETON

ERRATA.

On page 95, line 12, the citation in line should be 8 Pac. 907.

On page 141, line 5, from top, the citation of *McFarland v. McFarland*, should be 43 Or. 477.

On page 174, following headnote 7 should be this paragraph: "From Umatilla: W. R. Ellis, Judge."

On page 198, last word in line 9 from bottom should read "Affirmed."

On page 229, line 13 from top, the word "Stevens" should read "Stephens."

On page 427, next to the last line of headnote 2, the citation of B. & C. Comp. should be section 788.

On pages 480-440, the running head should be *Slate v. Henkle*.

On page 504, line 20 from the top, the citation of *White v. Holland* should be 17 Or. 8.

On page 532 the first line on the page should be this paragraph: "Statement by Mr. Justice Wolverton."

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CASES DECIDED
IN THE
SUPREME COURT
OF THE
STATE OF OREGON.

Argued 22 March, decided 18 April, 1904.

MEAD v. PORTLAND.

[76 Pac. 347.]

EFFECT OF FRANCHISE FIXING POSITION OF BRIDGE AS TO STREETS.

1. A legislative franchise to bridge a river flowing through a city, having given the grantee an option to locate it at any street that might be selected, and having provided that one of the approaches must conform to the grade of a certain street running at right angles to the direction of the bridge, the fact that the selection of the street is optional with the grantee does not render the statute any the less effective in establishing the grade of the selected street between the end of the bridge and the cross street as a straight line. In other words, such act is a change of the grade of the selected street between the cross street and the water's edge.

RIGHT ACQUIRED BY ACCEPTANCE OF PUBLIC FRANCHISE.

2. Where a municipal corporation, in pursuance of legislative authority, grants a privilege or right to use or occupy a public street for a public purpose, and the grantee, in reliance on the grant, expends money in developing the grant, he acquires a property interest or right which can be taken away only under the power of eminent domain, and after proper compensation.

CONSTRUCTION OF ORDINANCE GRANTING A PUBLIC FRANCHISE.

3. The owners of lots abutting on a river running north and south, which lots were divided by a street running east and west, terminating at the river, desiring to build wharves, an ordinance was passed, entitled "An ordinance authorizing the construction of a wharf in front of and opposite" the lots referred to. The ordinance provided that the owners of the lots were authorized and permitted to construct a wharf on and in front of the lots, and that the owners should construct a pontoon suitable for the landing of small boats, with steps leading from the pontoon to the lower floor of the wharf. It was provided that the upper story of the wharf should not extend beyond the lines of the block southwardly, save for a passageway 15 feet in width over the north side of the street, and that the whole passageway and a portion of the wharf extending onto the street should be subject to regulation and control by the municipality. *Held*, that the ordinance was a mere regulation of the construction of the wharves, and not a grant of any right or privilege to appropriate the street for wharfage purposes,

and hence the owners took no rights, because of expenditure of moneys in constructing the wharf, of which they could not be deprived by a change of grade of the street as an incident of the construction of an approach to a bridge.

RIGHTS OF LICENSEES IN PUBLIC STREET.

4. One occupying a public street under a permissive ordinance acquires no rights under the rule applicable to executed parol licenses.

LACK OF KNOWLEDGE AS AN ESTOPPEL.

5. A contract not of record and not known to a *bona fide* purchaser of the property thereby affected is not binding and there is no estoppel on such purchaser to deny its existence or effect.

From Multnomah: ALFRED F. SEARS, JR., ARTHUR L. FRAZER, and MELVIN C. GEORGE, Judges, in joint session.

This is a suit by Joshua Roberts Mead and others against the City of Portland and its officers to enjoin and restrain the defendants from closing a passageway in the approach to Morrison Street Bridge, leading to the lower floors of plaintiffs' wharves. The complaint, after alleging that the plaintiffs are the owners of block 76 and lots 3 and 4 in block 77 in the City of Portland, that such property is bounded on the east by the Willamette River, on the west by Front Street, and is divided by Morrison Street, avers that in 1878 the common council adopted "an ordinance authorizing the construction of a wharf in the Willamette River in front of and opposite lots Nos. 3 and 4 in block No. 77," as follows:

"Section 1. The owner or owners of lots 3 and 4, in block 77, in the City of Portland, are hereby authorized and permitted to construct a wharf of piles and timber in the Willamette River on and in front of the lots above mentioned, the easterly line of said wharf to run parallel with the east line of Front Street from a point 100 feet north of the north line of Morrison Street, the lower floor of said wharf to be as near ten feet above the base of grades as practicable: *provided*, that the owner or owners of said above described property shall construct and maintain at their own expense, a pontoon suitable for the landing of small boats, with suitable steps leading from the pontoon to the lower floor of the wharf; said pontoon to be constructed at the

foot of Morrison Street, and to be in accordance with the plan on file in the office of the auditor and clerk.

“Section 2. The upper story or floor of said wharf shall not extend easterly beyond the lines of the lower wharf or beyond the lines of the block southwardly, except for a passageway 15 feet in width along and over the north side of Morrison Street to within 28 feet of the easterly margin of said wharf, and for said distance of 28 feet said passageway shall not extend southwardly into said street for a greater distance than six feet: *provided*, that the whole of said passageway and all those portions of said wharf extending over and into the street shall be subject to regulation by the common council as a part of said street and sidewalk: And, *provided further*, that a suitable trap for fire purposes shall be placed in the lower roadway, to be kept clear and in order by the owners of said wharf.

“Section 3. The owners of the property described in section 1 of this ordinance are hereby authorized and permitted to erect a one-story warehouse thereon, to be constructed of wood with the roof covered with tin, anything contained in Ordinance No. 1140, entitled, ‘An ordinance providing for the prevention of fires and the protection of property endangered thereby,’ and the several amendments thereto to the contrary notwithstanding.”

Afterward, on February 21, 1879, the city council adopted a similar ordinance authorizing the owners of the property on the opposite side of Morrison Street to erect a wharf in front of their property, “running from the center line of Morrison Street extended in a direct course to a point 130 feet south of the center line of Morrison Street, extended at a distance of $137\frac{1}{2}$ feet from the east line of Front Street, the lower floor of said wharf to conform to the grade of Coulter and Church’s Wharf at its connection therewith.” This ordinance also required that the grantees should construct and maintain, at their own expense, at the foot of Morrison Street, and in accordance with the plans in the auditor’s office, a pontoon suitable for the landing of small boats, and contained a provision as to the erection of a

passageway from and along the south side of Morrison Street, and provided "that the whole of said passageway, and all those portions of said wharf extending over and into the street shall be subject to regulation by the common council as a part of said street and sidewalk." The complaint further avers that, under and in pursuance of the provisions of such ordinances, the respective predecessors in interest of the plaintiffs constructed wharves, consisting of two floors or stories, in front of the property owned by them; that the lower floor of each wharf extended to the middle of Morrison Street, and a sidewalk or passageway was erected on each side of the street, on a level with the second floor; that the second story, forming the upper floors of each of the wharves, was built slightly above the level of Front Street, while the lower floors were considerably below such level, and were connected with Front Street by a roadway or incline along Morrison Street, constructed by the owners of the property; that such wharves, docks, and warehouses, and the approaches thereto from Front Street, have been maintained and used by the plaintiffs and their predecessors in interest for more than 20 years as a landing place for boats and vessels navigating the waters of the Willamette River, and for people and teams having business at the docks or wharves; that "said docks and wharves upon and over said Morrison Street, and said approach thereto from Front Street, so constructed and maintained by plaintiffs and their predecessors in interest, have been used as a street or highway by the public," and " * * the same are a public street and highway"; that the wharf over and on Morrison Street, and the roadway leading thereto from Front Street, facilitate travel on that portion of Morrison Street between Front and the river, and contribute to the convenience of boats and vessels in landing, and were constructed and have since been maintained with that end in view, as well

as for the purpose of affording access to plaintiffs' property; that during the greater portion of every year boats and vessels have made their landing and discharged and received their freight and passengers on the lower floor of such wharf.

It is further alleged that in 1878 (Laws 1878, p. 55) the legislature passed an act authorizing the Portland Bridge Company, or its assigns, to construct and maintain a bridge across the Willamette River between Portland and East Portland at such point or location on the bank of the river on or along any of the streets, as might be selected by it, on or above Morrison Street, it being provided "that the approaches on the Portland side to said bridge shall conform to the present grade of Front Street in said City of Portland"; that about the year 1886, in pursuance of the provisions of the act referred to, the Portland Bridge Company, or its successors in interest, constructed a bridge between Portland and East Portland, the west end of which was located at the east end of Morrison Street, and also constructed a plank roadway or approach to the bridge from Front Street; that, when the bridge company began the construction of the bridge, it commenced to build two piers in the Willamette River to support the western end of the structure, within a few feet of and in front of the outer line of the wharves previously constructed by the plaintiff's predecessors in interest, and in such position as to interfere greatly with the use of such wharves; that thereupon the owners of the wharves protested against the acts of the bridge company, and threatened to bring suit or action to prevent the erection of such piers, on the ground that they were and would continue to be public nuisances and illegal; that, as a settlement of such controversy, and in consideration of the waiver by the property owners of their right to institute and prosecute suits and proceedings for such purpose, the bridge company

agreed forever to leave an opening in the center of the approach to the bridge for ingress and egress to and from the wharves of the plaintiffs; that, in pursuance of such agreement and compromise, the property owners refrained from prosecuting suits or proceedings to enjoin the construction of the piers, and the bridge company did not cover the whole of Morrison Street from Front Street to the west end of the bridge with the approach, but left an opening therein 18 feet wide, and extending easterly from Front Street about 95 feet, which opening has ever since existed and is now maintained; that in 1890 the bridge company, notwithstanding its agreement, threatened to close such opening, whereupon the property owners began a suit in the circuit court for Multnomah County to enjoin and restrain it from doing so, and, in consideration of the dismissal of such suit without cost or other proceedings therein, the bridge company contracted and agreed to leave the opening in its then condition, and it has ever since so remained.

It is also stated that in 1895 the legislature passed an act authorizing the City of Portland to acquire by purchase or condemnation the bridge referred to, and on July 3d of that year the bridge company conveyed it to the city by warranty deed, with all its appurtenances; that at the time of the purchase by the city the docks and wharves at the foot of Morrison Street, constructed by the property owners under the previous ordinances of the city, were being, and ever since have been, maintained and used by the plaintiffs and their predecessors in interest; that the defendants now threaten and are proceeding, without tendering or offering to plaintiffs any compensation therefor, to close the opening in the approach to Morrison Street Bridge, which will deprive them and the public of all means of access from the street to the wharves on Morrison Street, and the plaintiffs of property rights

without just compensation. A demurrer to the amended complaint was sustained by the court below, the complaint dismissed, and plaintiffs appeal. AFFIRMED.

For appellant there was a brief over the names of *Carey & Mays*, *Chas. E. S. Wood*, *Stewart B. Linthicum*, and *J. Couch Flanders*, with an oral argument by *Mr. Chas. H. Carey* and *Mr. Linthicum*.

For respondents there was a brief and an oral argument by *Mr. Lawrence A. McNary*, City Attorney, and *Mr. John P. Kavanaugh*.

MR. JUSTICE BEAN, after stating the facts in the foregoing terms, delivered the opinion of the court.

The only substantial difference between this case and that of *Brand v. Multnomah County*, 38 Or. 79 (60 Pac. 390, 62 Pac. 209, 50 L. R. A. 389, 84 Am. St. Rep. 772), is that the plaintiffs here assert that the ordinances authorizing the construction by their predecessors in interest of wharves in front of their property, and extending over and across the foot of Morrison Street, and the subsequent construction of such wharves, conferred upon them vested rights, of which they cannot be deprived without compensation, and that the agreement between them and the bridge company that the opening in the approach to the bridge on Morrison Street be forever left open is valid and binding on the defendants, as the successors in interest of the bridge company. The Brand Case decided that a change or alteration of the grade of a street in a municipality may be made by lawful authority, without liability to the abutting property owners for consequential damages, and that an act of the legislature authorizing the construction of a public bridge across the Willamette River at Portland, connecting the streets on either side of the river, and providing that the approach to the bridge on the west side shall conform to the grade of First

Street, is a legislative alteration or change of the grade of the cross street from First Street to the river, for which abutting property owners have no remedy, even though the construction of such approach may entirely cut off access from the street to a wharf in front of their property. So far, therefore, as any of these questions are involved in the present controversy, they are not now open to discussion.

1. The fact that the act of the legislature authorizing the building of the Madison Street Bridge provided that it should be located on a certain street, while that under which the Morrison Street Bridge was built gave the grantee an option to locate it on any street which it might select, on or above Morrison, does not render the latter act any the less effective in establishing the grade of the street selected, and upon which the bridge was actually built. The provisions of the two acts in regard to the approach to the bridge and the manner of its construction are substantially the same; the only difference being that in the former the grantee was confined to a particular street, while in the latter it had the right of selection. When, however, it did locate its bridge, it was as much bound to make the approach conform to the grade of First Street as if the particular street selected had been named in the act.

2. The principal contention is that, by the ordinances granting the plaintiffs and their predecessors in interest the right to construct wharves in front of their property, and to extend the lower floors thereof across the foot of Morrison Street, and to build an incline therefrom, connecting with Front Street, plaintiffs acquired an easement or property right in the street for the maintenance of such wharves and incline, and, having expended their money in the construction thereof, they cannot now be deprived of their rights without just compensation. For the purposes of this case it may be accepted as settled law that

where a municipal corporation, in pursuance of proper legislative authority, grants a valid franchise, privilege, or right to use or occupy a public street, common, or levee, or navigable waters adjacent thereto, for a public purpose, such as the construction and maintenance of wharves in aid of commerce, water tanks for use in sprinkling streets, telegraph and telephone poles, railway tracks, and the like, and the grantee, in reliance on such grant, expends money in the prosecution of his enterprise, he thereby acquires a property interest or right, which can only be taken away under the power of eminent domain and after proper compensation: 1 Dillon, Mun. Corp. (4 ed.) §§ 110, 111; 29 Am. & Eng. Enc. Law (1 ed.) 69; *Portland & W. V. R. Co. v. Portland*, 14 Or. 188 (12 Pac. 265, 58 Am. Rep. 299); *Savage v. Salem*, 23 Or. 381 (31 Pac. 832, 24 L. R. A. 787, 37 Am. St. Rep. 688); *City of Des Moines v. Chicago, R. I. & P. R. Co.* 41 Iowa, 569; *Phillipsburg Elec. Co. v. Phillipsburg*, 66 N. J. Law, 505 (49 Atl. 445); *Langdon v. Mayor of New York*, 93 N. Y. 129; *Williams v. Mayor of New York*, 105 N. Y. 419 (11 N. E. 829); *Kingsland v. Mayor of New York*, 110 N. Y. 569 (18 N. E. 435). In such case the grantee acquires a right or easement in the street different in kind from that enjoyed by the general public, and the building or structure put therein by him is under his control, subject to the paramount authority of the municipality.

3. But as we understand the ordinances in question, neither the plaintiffs nor their predecessors in interest were granted rights or privileges, within this rule, to construct and maintain a wharf at the foot of Morrison Street. The clear purpose of the ordinances was to authorize and regulate the construction of wharves in front of private property. It is so expressly stated in the title, and the granting part of the ordinances provides that the owner or owners of certain described property are authorized and

permitted to construct a wharf in the river "on and in front of" such property. There is nowhere in either of the ordinances a grant of any right or privilege to build a wharf at the terminus of Morrison Street. In the ordinance adopted in 1878 there is scarcely an inference that the lower floor of the wharf was to extend into Morrison Street, and, as regards the upper floor, the provision is that it should not extend beyond the line of the block, except for a passageway of a certain described width, and over the north side of the street. The grantee was required to construct and maintain pontoons in the river at the foot of the street for the landing of small boats, with steps leading therefrom to the lower floor of the wharf. It was expressly provided that the whole of the passageways along the street and those portions of the wharf extending over and into the street "shall be subject to regulation by the common council as a part of said street and sidewalks"; thus manifesting an intention to preserve the public character of the street, and not to vest in the grantee any rights or privileges therein not enjoyed by the general public. The ordinance of 1879, in describing the dimensions of the wharf authorized to be erected, says that it shall extend a certain distance south from "the center line of Morrison Street," and indicates that the wharf constructed by the property owners on the opposite side of the street extended to that point. The grant, however, is confined to the construction of a wharf "on and in front of" private property; there being a provision like the one in the former ordinance requiring the grantees to construct pontoons in the river for the landing of small boats, while the right is reserved to the council to regulate the passageways along the street, and any part of the wharves extending therein, "as a part of the street and sidewalk." The reasonable interpretation of these ordinances is that they were intended to regulate the construction of wharves by the

property owners on either side of the street in front of their property, with permission, perhaps, to extend the lower floors of such wharves over and across the foot of Morrison Street, for the purpose of affording access from the street to the wharves. There is, however, no grant of any privilege or right to use or appropriate the street, or an extension thereof, for wharfage purposes. On the contrary, the street and any improvements which may be put there by the abutting property owners were reserved to the use of the entire public, and the grantees had no greater rights under the ordinances than those enjoyed by the general public.

That this is the proper construction of the ordinances, and of the rights of the grantees thereunder, is supported by the averment of the complaint to the effect that the wharves and docks constructed by the plaintiffs and their predecessors in interest "upon and over said Morrison Street, and said approach thereto from Front Street, so constructed and maintained by plaintiffs and their predecessors in interest, have been used as a street or highway by the public," and * * "are a public street and highway." If the grantees acquired no other or greater rights or interests in the street than the general public, the fact that they have expended money in extending the street into the river, or building approaches therein to their wharves, or in otherwise improving it, does not give them a right to compensation for the loss or inconvenience caused by a change in the grade, any more than a change in the grade would entitle an abutting property owner to compensation because he had previously improved a street in front of his property by authority of the city. The grantees acquired no private rights under the ordinances, and the construction by them of the wharf and landing at the foot of the street was merely an extension of the street, which did not vest in them any rights other

than those they may have had as a part of the general public: *Hoboken L. & Improv. Co. v. Mayor of Hoboken*, 36 N. J. Law, 540. The fact that, by reason of the proximity of their property to the street, they were enabled to make more use of it and its extension than others did, is a mere difference in degree, and not in kind. If the grant had been to construct a wharf at the foot of the street, to be under the control of the grantee, with the express or implied power of collecting tolls for the use thereof, an entirely different question would have been presented for consideration, and the argument of plaintiffs would then have been cogent and forceful. The ordinances, however, did not give to the plaintiffs or to their predecessors in interest authority to build a wharf at the foot of the street for commercial purposes, but rather conferred the right to improve the street by extending it into the river, so that they could the more readily reach their own property therefrom; and the fact that their improvements have been rendered valueless on account of the subsequent change in the grade of the street does not entitle them to compensation.

4. Neither are they entitled to any rights under the rule applicable to an executed parol license. Their occupation of the street, and construction of the wharf and landing at the foot thereof, were permissive, under ordinances of the city defining their rights. They could not acquire any interest or easement in the street not conferred by the ordinances, because their use could not, in law, be adverse: *Thayer v. New Bedford Railroad*, 125 Mass. 253; Washburn, Easements, §§ 152, 197. We agree, therefore, with the court below, that the plaintiffs have no vested rights or interests in the street under the ordinances referred to.

5. Nor do we think they can claim relief as against the defendants on account of the alleged contract between them and the bridge company that the opening in the ap-

proach to the bridge should forever remain open. The alleged consideration for such contract was the waiver by the plaintiffs of a right to commence proceedings to enjoin the bridge company from constructing piers to support the bridge in the river opposite the foot of Morrison Street. In view of the rights of plaintiffs under the ordinances referred to, as we have interpreted them, it is doubtful whether this was a sufficient consideration for such contract: *Blackwell v. Old Colony R. Co.* 122 Mass. 1; *Thayer v. New Bedford R.* 125 Mass. 253; *President of Harvard College v. Stearns*, 15 Gray 1. The bridge company, moreover, was acting under a grant from the legislature authorizing it to construct the bridge for the use and convenience of the public as a highway, and it is far from certain that it had authority to contract away any of the rights or duties imposed upon it by the act. But however that may be, the alleged contract was not of record, and there is no averment in the complaint that defendants had notice or knowledge thereof at the time of their purchase.

There were some other questions discussed at the argument, including the effect of the act of the bridge company in leaving an opening in the approach to the bridge at the time of its construction, but they were involved in and determined by the Brand Case, and need not be further considered here.

It follows that the decree of the court below must be affirmed, and it is so ordered. AFFIRMED.

Argued 30 March, decided 18 April, 1904.

FROEBRICH v. LANE.

[76 Pac. 851.]

EQUITY JURISDICTION TO SET ASIDE FINAL PROBATE ORDERS.

1. A court of equity has jurisdiction to set aside a decree of a county court approving and settling the final account of an administrator, procured by fraud, notwithstanding Section 911, B. & C. Comp., giving the county court exclusive jurisdiction, in the first instance, to conduct and settle the accounts of adminis-

trators. This remedy, however, cannot be used to correct errors or irregularities, or to escape the results of neglect.

REMEDY AT LAW—MISTAKE—EXCUSABLE NEGLECT.

2. The right to relief in equity against a decree of the county court procured by fraud is not affected by Section 103, B. & C. Comp., providing for relief of a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, where the remedy therein provided has not been invoked.

FINAL ORDER REVIEWABLE IN EQUITY.

3. A decree approving and settling the final account of an administrator is such a final order as may be set aside in equity for fraud, though the property or fund has not been distributed nor the administrator discharged.

EXAMPLE OF FRAUD IN PROBATE SETTLEMENT.

4. Where an administrator and heirs of the decedent entered into an agreement limiting the administrator's compensation, but notice of the hearing for settlement of his account was published in an obscure part of a paper in fine type, and the administrator concealed from the heirs the fact that his final account had been filed, and he therein charged more for his compensation than had been agreed, there was such fraud in procuring a decree settling the account as to authorize a court of equity to set it aside.

LACHES IN COMMENCING SUIT.

5. A delay of eight months in beginning a suit after receiving knowledge of the facts relied upon is not a fatal delay.

From Marion: REUBEN P. BOISE, Judge.

This is a suit by David Froeblich and others against D. F. Lane, personally and as administrator, to set aside an order and decree of the county court of Marion County, made and rendered in the matter of the estate of Emanuel Froeblich, deceased, November 24, 1902, settling and allowing the final account of the administrator, the defendant herein. The deceased left an estate valued at \$3,935. Plaintiffs are his heirs, and, being citizens of the Empire of Germany, have been represented by C. V. Wintzingerode, Imperial German Consul at Portland, Oregon, and O. Lohan, his successor, who were authorized to act for and represent them in the matter of said estate by power of attorney, as well as by their attorneys in this proceeding. After stating the foregoing facts, the complaint continues in brief, that, after letters of administration were granted to defendant, one John Rieger, a creditor of decedent, instituted a proceeding for the revocation of such letters, and to secure his own appointment as adminis-

trator; that pending such contest, and while the same was on appeal, to wit, about April 26, 1902, the matter was compromised between the defendant on the one part and Rieger and these plaintiffs on the other, whereby it was agreed that the contest should be discontinued and abandoned, and defendant allowed to continue his administration and settle the estate, and that defendant in settling the same would not claim or charge any greater sum for counsel or attorney fees than \$300, and would not demand any extra compensation for his own services; that, in pursuance of the agreement and compromise, Rieger and plaintiffs caused the contest to be discontinued, and agreed to permit defendant to open the safe-deposit box wherein money and papers of the deceased were deposited, and to take the same into his possession; that on October 23, 1902, the defendant filed in said county court in said matter his final account, wherein, in violation of said compromise and agreement, he sought to charge the sum of \$171 as extra compensation over and above the percentage allowed him by law, the same being excessive, and no part of it having been earned, and also to claim and charge \$1,423 as attorney fees, being \$1,123 in excess of the amount agreed upon in said compromise, and that beyond this he charged the estate \$40 for stenographer's fees, and the further sum of \$15 for filing fees in a mandamus proceeding instituted in Multnomah County; that, in pursuance of defendant's application, an order was made by the county court, fixing Monday, November 24, 1902, at 9 o'clock A. M., for hearing and settling said account; that thereafter, and before the day fixed for settlement, when plaintiffs' attorneys inquired concerning the account, the defendant concealed from them the fact that it had been filed, whereby they were misled and deceived; that, for the further purpose of preventing plaintiffs and their attorneys from receiving knowledge of such filing, and to prevent them from

interposing objections to said account, he caused the notice of final settlement to be published in the *Salem Sentinel*, in an obscure part of the paper, in fine type, without appropriate headlines, and so spaced and placed that, without close inspection, it would readily be misconstrued, and taken to be explanatory matter accompanying a railroad and steamship time-table; that, relying upon defendant's good faith in keeping the agreement and compromise, and being deceived and misled by him as to the filing of said final account, and not knowing or having notice thereof, plaintiffs failed to appear or file objections thereto, as they would otherwise have done, and that the account was allowed and settled as filed; that plaintiffs have refused to accept the amount awarded them as their distributive shares of said estate, and that the delay in bringing this suit was caused by reason of plaintiffs being citizens and residents of Germany. A demurrer having been interposed to the complaint and sustained, a decree was rendered dismissing the suit, from which plaintiffs appeal.

REVERSED.

For appellants there was an oral argument by *Mr. Claire M. Inman* and *Mr. Arthur L. Veazie*, with a brief over the names of *F. A. Turner*, *C. M. Inman*, and *Gantenbein & Veazie* to this effect.

I. The jurisdiction of equity to grant relief against unconscionable judgments and decrees of all courts on an original bill to impeach, where they were obtained by fraud and imposition, or where a party has a meritorious defense and was prevented by fraud, accident, or mistake from maintaining such defense, without negligence on his part, was one of the most fruitful fields of original chancery jurisdiction, has long been unquestioned, and is now well established and continually exercised by courts of equity: 1 Black, Judgments, (2 ed.) § 356; 2 Pomeroy, Equity Juris.

(2 ed.) §. 919; Story, Eq. Pldgs. (9 ed.), § 426; *Baker v. O'Riordan*, 65 Cal. 368, 370; *Handley v. Jackson*, 31 Or. 552, 555 (65 Am. St. Rep. 839, 50 Pac. 915).

II. Equity will grant relief against a decree of a probate court on final settlement of an administrator or executor where the decree was obtained by fraud, or heirs have been prevented from maintaining their objections by fraud, and has jurisdiction of an original suit for such purpose: *Reinhardt v. Gartrell*, 33 Ark. 727; *Griffith v. Godey*, 113 U. S. 93; 2 Woerner, Admr'n, (2 ed.) § 508; *Morrow v. Allison*, 39 Ala. 72; *Lucich v. Medin*, 3 Nev. 93 (93 Am. Dec. 376); *Speed v. Nelson*, 8 B. Mon. (Ky.) 507; *Stong v. Wilkson*, 14 Mo. 90, 91; *Jones v. Brinker*, 20 Mo. 55, 56; *State to use v. Roland*, 23 Mo. 95-98; *Picot v. Bates*, 47 Mo. 390; *Allen v. Clark*, 2 Blackf. 343, 344; *Brackenridge v. Holland*, 2 Blackf. 377, 380 (20 Am. Dec. 123); *Ray v. Doughty*, 67 U. S. (4 Black) 115; *Shegogg v. Perkins*, 34 Ark. 117, 127; *Benson v. Anderson*, 10 Utah 135, 138; *Johnson v. Waters*, 111 U. S. 667, 668; *Baker v. O'Riordan*, 65 Cal. 368; *Schweitzer v. Bonn*, 31 Atl. 24, 26; *Vanmeter v. Jones*, 2 Green, Ch. 520, 524; *Waldrom v. Waldrom*, 76 Ala. 285, 289; *Crain v. Crain*, 17 Tex. 85, 86; *Dobbin v. Bryan*, 5 Tex. 142; *Neylans v. Burge*, 14 Smed. & M. 200, 204; *Green v. Creighton*, 10 Smed. & M. 159, 163; *Sheetz v. Kirtley*, 62 Mo. 417, 420.

III. No equity jurisdiction has been conferred upon the county court by the organic or statute laws of the state, and after the term it has no power to set aside for fraud its decrees on final settlement, or to entertain a bill to impeach such final settlement on the ground of fraud: *Richardson's Guardianship*, 39 Or. 249 (64 Pac. 390); *Grady v. Hughes*, 64 Mich. 540, 546; 2 Woerner, Admr'n (2 ed.) § 507; *Watt v. Watt*, 37 Ala. 543, 547; *Roy v. Giles*, 4 Lea (Tenn.)

535; *Harvey v. Wait*, 10 Or. 117; *Conant's Estate*, 43 Or. 530 (73 Pac. 1018, 1019); B. & C. Comp. § 909.

IV. The county court as a court of probate, can exercise only such jurisdiction as has been specially conferred, together with those incidental powers necessary to a proper execution of those expressly granted. Jurisdiction of the summary remedy provided for in Section 103, B. & C. Comp., is not specially conferred on the county court, and the county court can derive no authority from such section: B. & C. Comp. §§ 909, 911; *In re Underhill*, 117 N. Y. 471, 474; *In re Camp*, 126 N. Y. 377, 390; *Grady v. Hughes*, 64 Mich. 545; *Mathewson v. Sprague*, 16 Fed. Cas. No. 9,279; *Davidson v. Wampler*, — Mont. — (74 Pac. 82).

V. Such statutes limiting the time in which judgments may be set aside on motion or petition for mistake, surprise, excusable neglect, etc., have no application to the jurisdiction of equity to grant relief in an original suit on the ground of fraud where resort is first made to chancery for such relief, and has never been so held in this state: *Marsh v. Perrin*, 10 Or. 363; *Handley v. Jackson*, 31 Or. 552 (50 Pac. 915, 65 Am. St. Rep. 839); *Vanmeter v. Jones*, 2 Green's Ch. 523, 524; *Griffith v. Godey*, 113 U. S. 93; *Baker v. O'Riordan*, 65 Cal. 368; *Nealis v. Dicks*, 72 Ind. 375, 376; Pomeroy, Eq. Juris. (2 ed.) § 836; Black, Judgm. (2 ed.) § 356; *Irvine v. Leyh*, 102 Mo. 210, 211; *McNeil v. McNeil*, 78 Fed. 834, 835.

For respondent there was an oral argument by *Mr. Frank Holmes*, with a brief over the names of *Frank* and *W. H. Holmes* to this effect.

(1) Appellants do not show any reasonable excuse why they did not acquaint themselves with the proceedings in the case, and we insist that they are not entitled to relief from results occurring through their own negligence: *Oregon Ry. & Nav. Co. v. Gates*, 10 Or. 517; *Brown v. Alex-*

ander, 16 Or. 349, 353 (8 Am. St. Rep. 301 and note, 19 Pac. 9); *Galbraith v. Barnard*, 21 Or. 67, 69 (26 Pac. 1110); *Handley v. Jackson*, 31 Or. 552, 555 (65 Am. St. Rep. 830, 50 Pac. 915); *Belle v. Brown*, 37 Or. 588, 592 (61 Pac. 1024); *Johnson v. Templeton*, 60 Tex. 238; 1 Black, Judg. (2 ed.) § 356; Story, Eq. Pl. (9 ed.) § 428. Story, Eq. Juris. 1572.

(2) The county court still has jurisdiction over said estate, until the administrator performs the orders of the probate court and disburses all funds: *Hazelton v. Bogardus* 8 Wash. 102, 104; 2 Woerner, Admr'n § 506.

(3) Appellants had a remedy at law in the county court, by motion to secure same relief as sought for herein: B. & C. Comp. § 103; *Ladd v. Mason*, 10 Or. 312; *Thompson v. Connell*, 31 Or. 231, 235 (65 Am. St. Rep. 818, 48 Pac. 467); *Herren's Estate*, 40 Or. 90, 96 (66 Pac. 688); *Wilson's Guardianship*, 40 Or. 353, 356 (68 Pac. 393, 69 Pac. 439); *Conant's Estate*, 43 Or. 530 (73 Pac. 1018).

(4) Equity will not assume jurisdiction where party has legal remedy: *Snyder v. Vannoy*, 1 Or. 346; *Ferris v. Hayes*, 9 Or. 86; *Crews v. Richards*, 14 Or. 442, 445 (13 Pac. 67); *Helmick v. Davidson*, 18 Or. 456, 459 (23 Pac. 244); *Hughes v. Pratt*, 37 Or. 45 (60 Pac. 707); *Davis v. Hofer*, 38 Or. 150, 154 (63 Pac. 56); *Willis v. Crawford*, 38 Or. 522 (63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904, note); *Hoover v. Bartlett*, 42 Or. 145 (70 Pac. 378); *Abernathy v. Orton*, 42 Or. 437, 441 (71 Pac. 327, 95 Am. St. Rep. 774, note, B. & C. Comp. § 390).

(5) When the facts existed in law before trial for which relief in equity is sought, and were known to the party suing in equity, or might have been known or discovered by the exercise of diligence, no redress can be had in equity: *Oregon Ry. & Nav. Co. v. Gates*, 10 Or. 517, 518; *Galbraith v. Barnard*, 21 Or. 69 (26 Pac. 1110); *Johnson v. Templeton*, 60 Tex. 238; Story, Eq. Juris. 1573.

(6) A party must not rely upon the representations of an adverse party. If such could be the case a solemn decree entered by a court of competent jurisdiction would have less force and effect and dignity than such alleged representations: *Townsend v. Cowels*, 31 Ala. 428; *Mock's Heirs v. Steele*, 34 Ala. 198 (73 Am. Dec. 455.)

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion of the court.

1. The jurisdiction of a court of equity to interpose and set aside the order or decree of a county court approving and settling the final account of an administrator is first challenged by the demurrer. The especial ground for invoking equitable jurisdiction is fraud in procuring the order settling the account, consisting in the disregard and violation on the part of the administrator of the alleged compromise agreement, whereby he agreed that he would claim no extra compensation for his own services and no more than \$300 as attorney fees and charges. It is the undoubted province of equity, long maintained, to set aside and enjoin the execution or enforcement of judgments at law and of its own decrees, when they have been procured by fraud, unaccompanied by negligence, laches, or fault on the part of him who invokes the interposition of the remedy. This general statement of the law will hardly be controverted: 3 Pomeroy, Eq. § 1364; 1 Black, Judg. (2 ed.) § 321; *Phillips v. Negley*, 117 U. S. 665 (6 Sup. Ct. 901); *Hayden v. Hayden*, 46 Cal. 332; *Gates v. Steele*, 58 Conn. 316 (20 Atl. 474, 18 Am. St. Rep. 268); *Brooks v. Twitchell*, 182 Mass. 443 (65 N. E. 843, 94 Am. St. Rep. 662). It is earnestly and strongly controverted by respondent, however, that the rule has application to probate proceedings, and especially under our own procedure, where the county court is given the exclusive jurisdiction, in the first instance, pertaining to a court of probate, the statute

enumerating, among other powers, to grant and revoke letters testamentary of administration and of guardianship, and to direct and control the conduct and settle the accounts of executors, administrators, and guardians: B. & C. Comp. § 911. Speaking generally upon the subject, Mr. Woerner says: "In dealing with the judgments and decrees of probate courts upon the final settlements of executors and administrators precisely as with the judgments of other courts, courts of chancery review, enjoin, or annul them upon application of injured parties for fraud, and in some cases for mistake, or where the matter complained of may have arisen either from fraud or mistake, or constitutes constructive fraud:" 2 Woerner, Am. Law Adm. (2 ed.) § 508. So it was held in *Griffith v. Godey*, 113 U.S. 39 (5 Sup. Ct. 383), a suit in equity to surcharge the account of an administrator, that a probate settlement of an administrator's account does not conclude as to property fraudulently withheld from it; and, in Nevada (*Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376), that "a court of equity certainly has the power to inquire into the final account of an executor, and proceed to hear evidence to falsify and surcharge the account for fraud, and to render such decree as is necessary to do equity in the case"; and again, in Illinois (*Anderson v. Anderson*, 178 Ill. 160, 52 N. E. 1038), that a judgment of the county court on final settlement between the executor and the beneficiaries may be impeached in equity for fraud. See, also, *Waldrom v. Waldrom*, 76 Ala. 285, *Benson v. Anderson*, 10 Utah, 135 (37 Pac. 256), and *Johnson v. Waters*, 111 U.S. 640 (4 Sup. Ct. 619), as to the general doctrine applied to probate matters.

But the doctrine is applied as well in Arkansas (*Reinhardt v. Gartrell*, 33 Ark. 727), where the statute, like our own, has accorded exclusive original jurisdiction in the matter of the administration of the estates of decedents

to the probate courts. Mr. Justice EAKIN, rendering the opinion in that case, says: "The courts of chancery have no power to take such cases out of the probate courts, for the purpose of proceeding with the administration. But their power and functions to relieve against fraud, accident, mistake, or impending irremediable mischief is universal, extending over suitors in all courts, and over the decrees in those courts obtained by fraud, or rendered under circumstances which render it inequitable that they should be enforced. Hence any frauds in the settlements of administrators or executors may be corrected. When that is done, if there be still a necessity for continued proceedings in the course of administration, such proceeding should go on, in the probate court, upon the basis of the reformed settlement." To the same purpose, see *Shegogg v. Perkins*, 34 Ark. 117. Indeed, there can be no reason why the rule should not be applied in probate matters, where the order and decree complained of is in effect final, and not merely interlocutory, with the same efficacy as to the judgments and decrees of courts of law and equity possessing general jurisdiction within their peculiar province. The circuit courts of the state possess exclusive jurisdiction in all matters not accorded to the inferior courts, yet it is competent for equity to interpose and set aside or enjoin the enforcement of their judgments at law or decrees in equity where such judgments or decrees have been superinduced by fraud, and the complainant is free from inattention, negligence, and fault upon his part. So that the fact that the county court is accorded exclusive jurisdiction in the first instance has no peculiar emphasis or force to differentiate its final orders or decrees from those of any court of record possessing exclusive jurisdiction within its compass. The equitable remedy of which we are now treating has its just limitations, however. It cannot be utilized for the correction of errors and

irregularities, and, where the party has had an opportunity to be heard in the original proceeding and to have the matters revised on appeal, but has neglected to avail himself thereof, he is not entitled to redress in the equitable forum: *Galbraith v. Barnard*, 21 Or. 67 (26 Pac. 1110); *Handley v. Jackson*, 31 Or. 552 (50 Pac. 915, 65 Am. St. Rep. 839); *Conant's Estate*, 43 Or. 530 (73 Pac. 1018).

2. It is further urged that the plaintiffs had a complete remedy in the county court to open up the order of final settlement, under Section 103, B. & C. Comp., providing for the relief of a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. It may well be doubted whether such fraud as is here complained of is embraced within the purview of that section, and the question is made whether it was intended to apply in probate proceedings. But, however this may be, the remedy was not invoked, nor an adjudication had with reference to it, so that it did not preclude plaintiffs from proceeding in equity. The remedy thereby accorded, in whatsoever capacity it may be employed, is equitable in character, and we have held that when invoked in a proper case the party will be precluded by the adjudication from applying to a court of equity for relief of the same nature based upon grounds identical with those there urged: *Thompson v. Connell*, 31 Or. 231 (48 Pac. 467, 65 Am. St. Rep. 818). Hence the statute is not operative as an estoppel here, in any view we may take of its application in county court proceedings.

3. Again, it is suggested that the county court has not fully disposed of the matter, the distribution not having been made, the receipts filed, or the administrator finally discharged. But we think this is not controlling, as the order settling the account was the final adjudication respecting it. The rights of the respective parties were then ascertained and determined, leaving the administrator

nothing to do but to comply with the directions of the court, whereupon he would be entitled to his discharge. In view of these considerations, we are constrained to hold that a court of equity has jurisdiction of the cause.

4. The complaint is also challenged upon the ground that it does not state facts sufficient to constitute a cause of suit; but we are impressed that it does. The fraud complained of was such, it is true, that the heirs might have set it up before the county court by way of objections to the final account, if they had known that the account was filed and the time fixed for settling the same, but of this they were not apprised. The fraud complained of consists in the administrator's failure to keep and observe the stipulations of the compromise agreement upon his part. The heirs had a right to assume that he would faithfully observe them, and were not called upon to keep a check upon his actions and take especial notice of the proceedings had in that regard. While it may be conceded, without deciding the question now, that the notice published was sufficient to inform them constructively of the filing of the final account, and consequently of the administrator's breach of his agreement, yet, nevertheless, they allege that they had no actual notice of it until after the court had settled the account, and were thereby prevented from making the objections which they were entitled to interpose at the hearing. Under such allegations, it was not laches on the part of the heirs that they were not present at the hearing. Furthermore, it is averred that their attorneys on two occasions, after the account had been actually filed, and before the time set for hearing, inquired concerning it, and were led to believe by the administrator that it had not yet been filed, thus showing positive interposition to mislead interested parties, and thus to conceal the intended fraud.

5. Nor does the fact that plaintiffs did not institute the

present suit until more than eight months after the entry of the order of final settlement constitute such laches as to preclude them from insisting upon the remedy invoked.

The decree of the trial court will therefore be reversed, the demurrer to the complaint overruled, and the cause remanded for such further proceedings as may seem appropriate.

REVERSED.

Decided 21 January, 1904.

STATE v. ARMSTRONG.

[74 Pac. 1025.]

UNEXECUTED DEATH WARRANT—FIXING NEW DATE.

Where the time for executing a capital sentence is not part of the judgment, but is fixed by the court, the warrant does not expire (unless it is specially so provided) and is not affected by a failure to execute it at the appointed time. In such cases the better practice is for the court from which the warrant issued to assign a new date for the execution.

From Baker: ROBERT EAKIN, Judge.

Pleasant Armstrong appeals from an order fixing a new date for his execution, the time stated in the death warrant having passed while his case was on appeal: 43 Or. 207 (73 Pac. 1022).

AFFIRMED.

For appellant there was an oral argument by *Mr. M. M. Godman* and *Mr. Geo. J. Bentley*.

For the State there was an oral argument by *Mr. Andrew M. Crawford*, Attorney-General.

MR. JUSTICE BEAN delivered the opinion.

On March 31, 1903, a judgment of death was pronounced against the defendant by the circuit court for Baker County upon a conviction previously had. On the same day a warrant was duly issued, and delivered to the sheriff as required by law, in which a day was appointed for the execution of the judgment. Before the judgment was executed, however, an appeal was taken by the defendant, and a certificate of probable cause issued by one of the justices of

this court, thereby staying the execution. The judgment was affirmed in October, 1903: *State v. Armstrong*, 43 Or. 207 (73 Pac. 1022). At the time of the rendition of the judgment from which the appeal was taken, and the issuance of the warrant thereon, the statute provided that a judgment of death should be executed by the sheriff in the county where the action was commenced: B. & C. Comp. §§ 1456, 1457. Pending the appeal the statute was so amended as to require the execution to take place in the penitentiary, and performed by the superintendent or wardens thereof, but the amendatory act contains a provision that it should not apply to any warrant issued prior to its taking effect: Laws 1903, p. 66. After the judgment of affirmance had been remitted to the clerk of the court below, and by him entered in the journal, the circuit court caused the defendant to be brought before it, and thereupon, without resentencing him or issuing a new warrant, appointed another day for the execution of the warrant issued on the original judgment. The defendant insists that this was error. His contention is that under the amendatory act of 1903, which was then in force, the court had no power to direct him to be executed in Baker County, but should have issued a new warrant for his execution at the penitentiary, and this is the only question for consideration.

Under the statute the time for the execution of a judgment of death is no part of the judgment, and is not required to be stated therein. When the judgment is pronounced, a warrant signed by the judge and attested by the clerk, stating the conviction and judgment, and appointing a day upon which the judgment is to be executed, must be drawn and delivered to the sheriff of the county: B. & C. Comp. § 1456. After it has been executed, the sheriff or officer executing it must return it to the clerk, with a statement of his doings indorsed thereon: B. & C.

Comp. § 1460. If, after the warrant has been issued, an appeal is taken, its execution is stayed or suspended upon filing with the notice of appeal a certificate of the trial judge or a justice of this court that, in his opinion, there is probable cause for the appeal: B. & C. Comp. § 1475. And the sheriff or other officer having the defendant in his custody, upon being served with a copy of such certificate, must keep him without executing the warrant, and detain him to abide the judgment on appeal: B. & C. Comp. § 1477. A judgment may be reversed, affirmed, or modified by the appellate court, and a new trial ordered, if necessary: B. & C. Comp. § 1485. When a new trial is ordered, it must be directed to be had in the court below: B. & C. Comp. § 1486. From the entry of the judgment in that court the cause is to be deemed pending and for trial therein: B. & C. Comp. § 1489. There is no special provision as to the procedure in case of an affirmance of the judgment, except that, when the judgment upon appeal is given, it must be entered in the journal of the appellate court, and a certified copy of the entry forthwith remitted to the clerk of the court below: B. & C. Comp. § 1487. Upon its receipt the clerk must enter the same in the journal, and thereafter the judgment must be enforced without any further proceedings, unless the appellate court so direct, as a judgment of the court below: B. & C. Comp. § 1488.

From these provisions of the statute, it is clear that an appeal in criminal actions does not vacate the judgment, or the warrant issued thereon, nor does it suspend the execution thereof, unless a certificate of probable cause is filed with the notice of appeal: *Whitley v. Murphy*, 5 Or. 328 (20 Am. Rep. 741). If such a certificate is filed, it operates to suspend or hold in abeyance the execution of the judgment, and the sheriff or officer having the custody of the defendant is required to keep him to abide the judg-

ment on appeal. Any further proceedings under the warrant or judgment are by the appeal and certificate of probable cause suspended until the appeal is disposed of, but the validity of the judgment or the warrant is not affected by the appeal unless the cause is reversed. The affirmance of the judgment is a finding that there is no error therein, and the cause stands in the court below after the certified copy of the order of affirmance has been entered in the journal by the clerk thereof, so far as its execution is concerned, the same as if no appeal had been taken, and for some other reason the warrant had not been executed on the day appointed. The warrant has not expired by limitation, and its commands have not been obeyed. Further proceedings thereon were suspended pending the appeal, but the defendant was held and is in custody under the original warrant directing his execution. The officer cannot execute the warrant, it is true, not because it has expired, but because the day fixed by the court has passed, the same as if the prisoner had escaped, or, for some other reason not affecting the validity of the judgment, the day appointed had been allowed to pass without the execution of the judgment. In such case the authorities are agreed, so far as we have been able to discover, that it is the duty of the court or officer vested by law with the power of fixing the day for the execution of the sentence to assign a new day, and the resentencing of the defendant or the issuance of a new warrant are not required. Mr. Bishop says: "If the time for the execution passes, and it is not done, or if the condemned man 'come to life after he be hanged,' another day should be assigned, the prisoner being taken before the tribunal for the purpose": 1 Bishop, New Crim. Proc. § 1311, par. 21. Where, as under our statute, the time for the execution of the sentence in a capital case is no part of the judgment, but is to be fixed by some officer or authority independent of the judgment,

it is generally regarded as a mere ministerial act in pursuance thereof, and the judgment or warrant is not rendered invalid by the prisoner's escape or other occurrence which merely prevents or delays the execution: *Commonwealth v. Hill*, 185 Pa. 385 (39 Atl. 1055); *Ex parte Howard*, 17 N. H. 545; *Nicholas v. Commonwealth*, 91 Va. 813 (22 S. E. 507); *State v. Kitchens*, 2 Hill (S. C.) 612 (27 Am. Dec. 410); *State v. Cardwell*, 95 N. C. 643. Indeed, in *Commonwealth v. Hill* it was held that it was the duty of a sheriff who had allowed the time fixed for the execution of a convict to pass without executing the sentence, under a mistaken belief that an appeal operated as a supersedeas, to execute the sentence upon the affirmance of the judgment, without any further order of the court, and at a time to be selected by him. This is perhaps an extreme rule upon the subject, and the better doctrine is that stated by Mr. Chief Justice FULLER *in re Cross*, 146 U. S. 271 (13 Sup. Ct. 109)—that in such case it becomes "the duty of the court to assign, if there had been no other disposition of the case, a new time for execution," citing authorities.

We are of the opinion, therefore, that the proper procedure was had in the court below, by fixing another day for the execution of the judgment against the defendant, and that such execution may properly take place under the warrant issued prior to the appeal. The judgment of the circuit court was the only one upon which the defendant could be executed, and it was not necessary for him to be resentenced after the affirmance of the case on appeal (*In the Matter of the Application of Ferris*, 35 N. Y. 262), nor for any further proceedings to be had thereon, except to fix a new day for his execution. The warrant directing the execution of the defendant was therefore issued prior to the taking effect of the act of 1903, and is excepted from its operation. The judgment is affirmed. AFFIRMED.

Argued 21 April, decided 16 May, 1904.

LIVESLEY v. JOHNSTON.

[76 Pac. 18, 946.]

DISMISSING APPEAL—TERMINATION OF CONTROVERSY.

1. Though an appeal should be dismissed when the cause of controversy has ceased to exist, such a disposition should not be made of a case where the only result of the change is to perhaps render the judgment or decree fruitless. If the dispute still exists, it should be determined.

For instance: In a suit to require specific performance of a contract to sell chattels where an interlocutory injunction restraining the defendant from disposing of the property was dissolved upon a decree being entered against the plaintiff, the appeal should not be dismissed because the defendant thereafter sold the property and it was removed from the state. The plaintiff's right to a decision on the merits of his claim cannot be destroyed by the act of defendant: *Moore v. Moore*, 36 Or. 261, and *State ex rel. v. Grand Jury*, 37 Or. 542, distinguished.

MUTUALITY OF CONTRACTS OF SALE ON CONDITION OF QUALITY.

2. A contract of sale binding one party to sell and the other to buy a certain quantity of property of a designated quality is not unilateral because the determination of the quality or quantity is left to some third person or even to one of the parties, the legal implication being that each shall act honestly and fairly.

This case affords an illustration of the application of the rule stated: A contract by which a grower agrees to sell and deliver a specified quantity of his crop of hops, and the buyer agrees to pay therefor a certain price in partial payments at stated times, is not wanting in mutuality because it provides that if the hops be of a lesser quality than agreed on, or not delivered in the condition agreed on, "according to the judgment" of the buyer, he shall still have the privilege of taking them, or enough to cover the advances, at a reduction in price equal to the difference in value between them and hops of the quality contracted for, or because it provides that the buyer shall have the right to determine at picking time whether the crop is in proper condition, and, if it is not in such condition, the buyer shall be released from obligation to furnish picking money. In these contingencies the legal obligation rests on both parties to be fair, and if either is not, the other party has a remedy, so the contract is quite bilateral.

SPECIFIC PERFORMANCE OF CONTRACT TO SELL—REMEDY AT LAW.

3. Though usually an action at law is an adequate remedy for the nonperformance of a contract to sell personalty, it may be otherwise, and that an award of damages will not afford the redress to which the injured party is entitled. Under such circumstances equity will decree a specific performance.

INSOLVENCY AS A REASON FOR SPECIFIC PERFORMANCE.

4. Insolvency of the vendor in a contract for the sale of chattels is not of itself a sufficient reason for decreeing a specific performance of such contract, though it may be a persuasive factor in deciding a court to act where it already has jurisdiction on other grounds.

SPECIFIC PERFORMANCE OF CONTRACT TO SELL PERSONALTY.

5. A contract of sale and delivery, at a certain price, of crops to be grown in certain succeeding years—the buyer each year to advance for cultivating and picking purposes a sum exceeding half the agreed price, to become a lien on the crops—will be specifically enforced, to the extent that after the crops have been produced, and the buyer has contributed to the production, or has at all times been ready and willing to do so, delivery will be required; the venture being in a sense, a joint one, whereby the seller becomes, in a manner, a trustee, the buyer

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p48	48

having at the making of the contract, as part consideration, surrendered the seller's note, and the seller being insolvent.

SPECIFIC PERFORMANCE—COMPLAINT.

6. The complaint in an action to compel delivery of crops under a contract by which defendant sold and agreed to deliver crops to be raised by him on land alleged in the contract to be owned by certain other persons, need not allege that defendant held the land under a lease, so as to give him a potential interest in the crop, the inference being that he had rented it.

IDEM.

7. The complaint in an action to compel delivery of crops under a contract by which defendant sold and agreed to deliver crops to be grown, they to be of choice quality and in first-class condition, need not allege that they were of the quality and in the condition agreed, as defendant cannot complain if plaintiff is willing to take them as of the stipulated quality and condition.

From Marion: REUBEN P. BOISE, Judge.

Suit by T. A. Livesley and John J. Roberts to require John Johnston to specifically comply with a contract to sell plaintiffs certain hops, other parties being made defendants because they were connected with the possession of the property. The suit was dismissed on demurrer to the complaint, from which order plaintiff appealed. Defendant's motion to dismiss the appeal was overruled, and the case reversed on the merits, both opinions being written by Mr. Justice WOLVERTON. Additional facts appear in the opinions. MOTION OVERRULED: REVERSED.

Decided 4 April, 1904.

ON MOTION TO DISMISS APPEAL.

Mr. Loring K. Adams and *Mr. George G. Bingham*, for the motion, relied on the following authorities:

When the subject matter in controversy has disappeared or ceased to exist, or when for any reason the decree cannot be operative (as here, where the property sought to be specifically obtained has gone beyond the reach of the courts), the appeal is uniformly dismissed: *Moore v. Moore*, 36 Or. 261 (59 Pac. 327); *State ex rel. v. Grand Jury* 37 Or. 542 (62 Pac. 208); *Kidd v. Morrison*, Phill. Eq. 31;

Hice v. Orr, 16 Wash. 63 (47 Pac. 424); *Washington Market Co. v. District of Columbia*, 137 U. S. 62 (11 Sup. Ct. 4); *California v. San Pablo & T. Ry. Co.* 149 U. S. 308 (13 Sup. Ct. 876); *Mills v. Green*, 159 U. S. 651 (16 Sup. Ct. 132); *Allen v. Georgia*, 166 U. S. 138 (17 Sup. Ct. 525); *Kimball v. Kimball*, 174 U. S. 158 (19 Sup. Ct. 639); *Thorp v. Bonnifield*, 177 U. S. 15 (20 Sup. Ct. 533); *Montana Min. Co. v. St. Louis M. & M. Co.* 186 U. S. 24 (22 Sup. Ct. 744); *Tennessee v. Condon*, 189 U. S. 64 (23 Sup. Ct. 579).

Mr. Wirt Minor and *Mr. Woodson T. Slater, contra*, relied on the following authorities:

The rights of parties to controversies pending in this court are fixed by the record made in the court from which the appeal is taken, and cannot be affected by subsequent actions of their adversaries: *Walker v. Goldsmith*, 14 Or. 125 (12 Pac. 537); *Houston v. Timmerman*, 17 Or. 499 (4 L. R. A. 716, 11 Am. St. Rep. 848, 21 Pac. 1037); *Jennings v. Kiernan*, 35 Or. 349 (55 Pac. 443); *Posson v. Guaranty Loan Assoc.* 44 Or. 106 (74 Pac. 923); *Waterman*, Spec. Perf. §§ 512, 515, 517.

MR. JUSTICE WOLVERTON delivered the opinion.

1. The purpose of the present suit is to require the specific performance of a contract made and entered into by and between plaintiffs and defendant Johnston for the purchase and sale of 110 bales of hops, which were to be, and were, grown and produced by Johnston. The complaint contains the usual allegations of performance on the part of the plaintiffs, but avers that defendant Johnston refused to comply with the stipulations on his part to deliver the hops to plaintiffs as contracted. It is further alleged that the defendants Adolf Wolf & Son claim to have a lien upon the hops, and the defendant the Southern Pacific Company has them in its possession, having been delivered to it by Johnston. The prayer is for a tem-

porary injunction restraining the defendants or either of them from selling or disposing of the hops or removing them from their present place of storage until the final determination of the suit, and for a decree requiring the specific performance of the contract for the delivery of the hops by defendants to plaintiffs. The injunction was allowed as prayed, to be and continue in force and effect until the further order of the court. Subsequently a demurrer was interposed to the complaint, and sustained, whereupon a decree was entered dismissing the suit and dissolving the injunction. From this decree plaintiffs have appealed, having given notice thereof in open court at the time of its rendition.

The defendants now move to dismiss the appeal, basing their motion upon a showing that the defendant Johnston has since the decree disposed of the hops, which have been shipped out of the state and beyond the jurisdiction of the court. The contention is that, as the subject-matter of the suit has been disposed of and taken beyond the jurisdiction of the court, the decree respecting it could not become effective or operative, and hence the appeal should be dismissed. This seems to us to mistake the real issue, which is whether Johnston should or should not be required to perform his contract. Whether the hops are still within the custody of the law or not, is not the question. The suit could as well have been commenced without as with the injunction, and all the issues tried out and the cause fully determined. The injunction is allowed under the statute as a provisional remedy: B. & C. Comp. § 417. It is an auxiliary proceeding, and was resorted to in the present instance to preserve the *status quo* of the property during the pendency of the suit, so that plaintiffs, if successful, might be the better enabled to enforce their decree. The enforcement of the decree, however, is

no part of the cause of suit, and the probable insusceptibility of its enforcement affords no reason why a person may not obtain the decree if he desires to be at the pains; so that the plaintiffs here have the right to their decree if their cause of suit is well founded, notwithstanding Johnston has disposed of the hops and the court is unable to reach them with its process. Whether he had a right to do this in the face of the appeal, or what effect the appeal may have had upon the status of the injunction, are matters with which we are not at present concerned. It is sufficient that Johnston could not determine the cause of suit by his own act in rendering the decree more difficult of enforcement, if one should be finally obtained against him. What he did was not effective to determine the suit or controversy in any sense, and the cause yet remains to be disposed of. The many authorities cited by counsel are inapplicable to the present conditions, they being cases where, by reason of the action of the parties or the efflux of time, there was no real controversy left for determination.

The motion to dismiss will therefore be denied.

Decided 16 May, 1904.

ON THE MERITS.

MR. JUSTICE WOLVERTON.

This is a suit to require the specific performance of a contract or agreement for the sale of hops, entered into September 5, 1902, between the defendant Johnston, of the first part, and the plaintiffs, T. A. Livesley & Co., of the second. That portion of it material to the controversy is as follows:

“That said party of the first part * * for and in consideration of the sum of one dollar in hand paid by the

parties of the second part, the receipt whereof is hereby acknowledged, has bargained and sold, and by these presents does grant, sell and convey and agree to deliver unto the parties of the second part, * * 20,000 pounds of hops of the crops to be raised and grown by the party of the first part at or near Woodburn in each of the following years: 1903, 1904, 1905, 1906, 1907, on the following described real estate, which is owned by Frank Chappelle, Melane Chappelle and Peter Deltaur [describing it], and to deliver the said hops in each of said years at Woodburn depot or on board cars free of charge, at such time between the 1st and 31st of October of each of said years as the parties of the second part may direct, each bale of said hops to contain from one hundred and eighty to two hundred twenty pounds of hops (seven pounds tare per bale to be allowed) and are to be put up in new 24-oz. bale cloth. The said hops shall be of choice quality, of even color, well and cleanly picked and well cured, but not high or slack dried, and not broken or mouldy.

The said parties of the second part agree to advance to the said party of the first part for the purpose of cultivating, two hundred fifty dollars on or about April, May and June, and for picking purposes at and during picking time of September of each of said years, the sum of 4½ cents per pound, and for such advances a lien is hereby granted to parties of the second part on said crop of hops prior and preferable to all other liens; and upon the delivery and acceptance of said hops, the said parties of the second part will pay in current funds of the United States or their equivalent at Salem, Oregon, the balance due on said hops at 9½ cents per pound, that being the agreed price for said hops, and all money advanced for the purposes aforesaid is to be deducted from the purchase price of said hops. The advances made for cultivating shall bear interest at the rate of eight per cent, and advances made for harvesting purposes at the rate of eight per cent.

Should said hops be from any cause of a lesser quality than choice, or not delivered in the condition herein agreed upon according to the judgment of said parties of the second part or their agent, the party of the second part shall nevertheless have the privilege of taking the

same, or so many of them as will cover the amount advanced on said crop of hops, with interest at the rate of eight per cent per annum, at a reduction in price equal to the difference in value between such hops and choice. * *

The party of the first part shall not be liable (except to repay advances) for any shortage on delivery due to causes beyond his control. It is furthermore agreed that the party of the second part, through their agents shall have the right to determine at picking time when said advances are contemplated to be made, whether or not the growing crop at that time is in proper condition, and if such agents of the party of the second part shall determine that the growing crop is not in such condition, that said party of the second part shall be released from any obligation to furnish any picking money as called for in this contract."

The succeeding clause of the agreement is in effect a chattel mortgage upon the hops to secure the buyer in the repayment of moneys advanced or to be advanced the grower in pursuance of the agreement.

The complaint sets out, among other things, the entering into the agreement by the parties; that, as part consideration for the execution thereof plaintiffs paid to Johnston the sum of one dollar and also surrendered up and delivered to him certain promissory notes due and payable to the plaintiffs, of the face value of \$650; that plaintiffs have performed and have been at all times ready and willing to perform all the agreements and covenants upon their part, and have offered and tendered to Johnston the advances required to be made by them, but that Johnston some time early in the year 1903 notified the plaintiffs that he would not accept any advances, and declared that he would no longer be bound by the terms and conditions of the agreement, and has continuously refused to deliver to plaintiffs the hops produced for the year 1903, consisting of 110 bales, of the aggregate weight of 20,000 pounds; that defendant Johnston is wholly insolvent and unable to respond in damages for the breach of his agreement,

and plaintiffs have no plain, speedy, and adequate remedy at law. The purchase price is tendered into court, and a decree demanded that Johnston be required to perform by delivery to plaintiffs of the hops designated. A demurrer was interposed to the complaint and sustained, and, the complaint having been dismissed, the plaintiffs appeal.

REVERSED.

For appellants there was an oral argument by *Mr. Wirt Minor* and *Mr. Woodson T. Slater*, with a brief over the names of *Teal & Minor*, *W. T. Slater*, and *William M. Kaiser*, to this effect.

I. The agreement is mutual and not unilateral. The seller agrees to sell certain property at a certain price, payable on or before delivery, and the buyer tendered the price and demanded the goods: *Wise v. Ray*, 3 G. Gr. 430; *Patchin v. Swift*, 21 Vt. 292; *Mill Co. v. Goodnough*, 40 Minn. 497 (4 L. R. A. 202); *Penniman v. Hartshorn*, 13 Mass. 87; *Justice v. Lang*, 42 N. Y. 493 (1 Am. Rep. 496); *Cutting v. Dana*, 25 N. J. Eq. 265; *Waterman v. Waterman*, 27 Fed. 827; *Johnston v. Trippe*, 33 Fed. 530; *Storm v. United States*, 99 U. S. 83.

II. The consideration of the agreement moving to the defendant is threefold: the past indebtedness of the defendant to the plaintiffs, a sum of money paid defendant by plaintiffs at the time the agreement was made, and the several promises of the plaintiffs: 1 Parsons, Contracts, 436, 444, 448.

III. The agreement in controversy was founded upon a valuable consideration—the promises on behalf of Johnston are unequivocal, positive, and unconditional. It is, therefore, immaterial whether the plaintiffs, by the terms of the agreement, were or were not bound to purchase the hops: *Johnston v. Trippe*, 33 Fed. 530; *Perkins v. Hadsell*, 50 Ill. 216; *Miller v. McKenzie*, 95 N. Y. 575 (47 Am. Rep. 85); *Clason v. Bailey*, 14 Johns. 484; *In re Hunter*, 1

Edw. Ch. 1; *Van Dorn v. Robinson*, 16 N. J. Eq. 256; *Hawratty v. Warren*, 18 N. J. Eq. 124 (90 Am. Dec. 613); *Smith's Appeal*, 69 Pa. St. 474; *Rogers v. Saunders*, 16 Me. 92 (33 Am. Dec. 635); *Vassault v. Edwards*, 43 Cal. 458; *Schroeder v. Gemeider*, 10 Nev. 355; *Waterman v. Waterman*, 27 Fed. 827; *Waterman*, Spec. Perf. § 200; *Fry*, Spec. Perf. § 291.

IV. It is the chief and immediate duty of the seller to tender the goods to the buyer at the place and time fixed by the agreement, and the buyer's duty to accept the goods so tendered and pay the purchase price agreed on: 21 Am. & Eng. Ency. Law (1 ed.), p. 522-531, 544, 554; 2 Benjamin, Sales, (4 Am. ed.) §§ 1013-1016, 1024-1026; *Bement v. Smith*, 15 Wend. 493; *Dustin v. McAndrew*, 44 N. Y. 72; *Hayden v. DeMetz*, 53 N. Y. 426; *Mason v. Decker*, 72 N. Y. 595 (28 Am. Rep. 190); *Hunter v. Wetsell*, 84 N. Y. 549 (38 Am. Rep. 544); *Bagley v. Findlay*, 82 Ill. 524; *Bell v. Offutt*, 10 Bush, 632; *Ballentyne v. Robinson*, 46 Pa. St. 177; *Sedgwick v. Cottingham*, 54 Iowa, 572; *Nichols v. Morse*, 100 Mass. 523; *Brigham v. Hibbard*, 28 Or. 386 (43 Pac. 383); *Wadhams v. Balfour*, 32 Or. 313 (51 Pac. 642); *Gunther v. Attwell*, 19 Md. 157.

V. The end of every contract is the accomplishment of the thing stipulated, and therefore the most direct and effectual remedy, where one party refuses to observe the contract, should be the enforcement of the promise. The law, moreover, regards money as the measure of every loss, a proposition which is frequently but not universally true, and this legal principle results in a defect of justice. It was this inadequacy of the remedy at law which gave rise to the jurisdiction of equity, which was invoked for the specific performance of contracts at a very early date: *Waterman*, Spec. Perf. §§ 1-5, 16-20; 2 Story, Eq. Juris. §§ 712, 718; *Adams*, Eq. § 77.

VI. The facts alleged in the complaint and admitted

by the demurrer show that the remedy at law is inadequate. Insolvency has ever been held to be a ground of equity jurisdiction, as the beneficial effect of the judgment depends upon the solvency of the judgment debtor: *Clark v. Flint*, 22 Pick. 231 (33 Am. Dec. 733); *Somerby v. Buntin*, 118 Mass. 279 (19 Am. Rep. 459).

For respondents there was an oral argument by *Mr. George G. Bingham* and *Mr. Peter H. D'Arcy*, with a brief over the names of *Peter H. D'Arcy, Carson & Adams*, and *George G. Bingham*, to this effect.

1. Specific performance of contracts relating to personal property is enforced by the courts only in exceptional cases. This is the general rule: *Waterman*, Spec. Perf. § 5; *Rector of St. David's v. Wood*, 24 Or. 396 (41 Am. St. Rep. 860, 34 Pac. 18).

2. A decree for the specific performance even of contracts for the sale of real property, "does not go as a matter of course, but is granted or withheld according as equity and justice seem to demand in view of all the circumstances of the case": *McCabe v. Matthews*, 155 U. S. 550 (15 Sup. Ct. 190); *Pope Mfg. Co. v. Gormully*, 144 U. S. 224 (12 Sup. Ct. 632); *Snider v. Lehnherr*, 5 Or. 385, 390.

3. The courts seldom enforce specific performance of contracts covering a long period of time, or where specific performance is impracticable: *Marble Co. v. Ripley*, 77 U. S. 339; *Texas & Pac. Ry. Co. v. City of Marshall*, 136 U. S. 393 (10 Sup. Ct. 846); *Iron Age Pub. Co. v. Western Union Tel. Co.* 83 Ala. 498 (3 Am. St. Rep. 758, 3 So. 449); *Sturges v. Galindo*, 59 Cal. 28 (43 Am. Rep. 239).

4. Insolvency of the defendant will not give the court jurisdiction to enforce specific performance of his contract: *Cincinnati, etc. Ry. Co. v. Washburn*, 25 Ind. 259.

5. Contracts for personal services cannot be specifically enforced: *Cort v. Lassard*, 18 Or. 221 (17 Am. St. Rep. 726, 6 L. R. A. 653, 22 Pac. 1054); *Clark's Case*, 1 Blackf. 122

(12 Am. Dec. 213); *Blanchard v. Detroit Ry. Co.* 30 Mich. 44, 59; *Roberts v. Kelsey*, 38 Mich. 602; *Iron Age Pub. Co. v. Western Union Tel. Co.* 83 Ala. 498 (3 Am. St. Rep. 758, 3 So. 449); *Cincinnati Ry. Co. v. Washburn*, 25 Ind. 259; *Columbus Ry. Co. v. Watson*, 26 Ind. 50; *The William Rogers Mfg. Co. v. Rogers*, 58 Conn. 356 (18 Am. St. Rep. 278, 7 L. R. A. 779, 20 Atl. 467).

6. Where the property is not in existence at the time of the contract or where defendant has no title at such time, a contract to convey will not be specifically enforced even when defendant afterwards becomes possessed of the property: *Manton v. Ray*, 18 R. I. 672 (49 Am. St. Rep. 811, 29 Atl. 998); *Kennedy v. Hazleton*, 128 U. S. 667 (9 Sup. Ct. 202); *Norris v. Fox*, 45 Fed. 406; *Sellers v. Greer*, 172 Ill. 549 (40 L. R. A. 589, 592, 50 N. E. 246); *Whiteaker v. Van Schoiack*, 5 Or. 113.

7. Equity has no jurisdiction to enforce the specific execution of contracts to cultivate crops in a particular way, or deliver products of farms for past and future advances: *Hall v. Joiner*, 1 S. C. 186; *Starnes v. Newsom*, 1 Tenn. Ch. 239.

8. Courts will not specifically enforce a contract, even though valid at law, unless it is fair, just, reasonable, and equal in all its parts: *Duvall v. Myers*, 2 Md. Ch. 401; *Barrett v. Schleich*, 37 Or. 613, 617 (62 Pac. 792); *Wagonblast v. Whitney*, 12 Or. 83, 88 (6 Pac. 399); *Dodd v. Home Ins. Co.* 22 Or. 13, 14 (29 Pac. 3); *Starnes v. Newsom*, 1 Tenn. Ch. 239; *Hissam v. Parrish*, 41 W. Va. 686 (56 Am. St. Rep. 892, 24 S. E. 600); *Rust v. Conrad*, 47 Mich. 449 (51 Am. Rep. 720).

9. A contract in order to be specifically enforced by either party must have been capable of specific enforcement by the other party at the time the contract was executed: *Norris v. Fox*, 45 Fed. 406; *Sellers v. Greer*, 172 Ill. 549 (40 L. R. A. 589-592, 50 N. E. 246).

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion of the court.

2. In support of the demurrer it is first insisted that the contract or agreement set out, upon which the suit is founded, and which it is sought to have specifically performed, is lacking in the essential of mutuality of obligations between the contracting parties, and is therefore without validity or binding effect. The plaintiffs stand upon the agreement, and, of course, assert its legal efficacy. They insist, first, that it does contain mutual obligations which alone render it binding upon both parties; but, if not, that it at least has the force and effect of an option accorded the plaintiffs to purchase the hops, founded upon a sufficient consideration to support it. A promise founded upon a good consideration rendered at the time is obligatory and enforceable. A loan of money and simple-contract debts are familiar instances of the kind. The promise to repay the money or to discharge the debt becomes binding and obligatory by reason of the promisor having received a consideration for making it. When, however, a promise, by whatsoever reason, has become binding, it is more aptly termed an "obligation." But a promise of material import will support a counter promise and *vice versa*. When mutually entered into, they operate one as a consideration for the other; thus constituting an agreement binding and obligatory upon both parties. Where the agreement is wholly executory, it is essential that the obligations be mutual; else there is no consideration for its support, and it is but a mere *nudum pactum*. These simple principles, aptly applied, will aid us largely in the present controversy.

The contract is between a producer of hops, on the one part, and dealers in that commodity, upon the other. Its terms unmistakably import a sale of the hops to the amount of 20,000 pounds, to be grown by Johnston in each of the five years designated, and an agreement upon his part

to deliver them at Woodburn, on board the cars, free of charge, at such time during the month of October as the second parties may direct. The manner in which the hops shall be baled and their quality are specifically defined. This is a clear and absolute undertaking on the part of the seller. The correlative and reciprocal promises on the other part are that the second parties will advance to the first party \$250 on or about April, May, and June of each year for cultivating purposes, and 4½ cents per pound for picking purposes during picking time, in September, and, upon delivery and acceptance of the hops, that they will pay the balance due thereon at 9½ cents per pound, that being the agreed price for the product; all moneys advanced to be deducted from the purchase price. If the contract rested here, nothing else being said, no other provisions made, there could be no cavil or controversy touching its validity and binding effect. It would have then simply been a sale of the hops to be grown, with an agreement to deliver on the one part, and an undertaking on the other part to advance \$250 for the purpose of cultivating, 4½ cents per pound for picking purposes, and to pay 9½ cents per pound for the hops upon delivery and acceptance; reserving the right, as was natural, to deduct advances made from the purchase price, paying merely the balance due. The promises of the parties would then have been mutual—that upon the one hand supporting those upon the other, and *vice versa*, thus creating correlative and reciprocal obligations—and the contract would unquestionably have been perfectly valid and binding upon both parties. But the promises upon the part of Livesley & Co. to advance picking money and accept the hops are materially qualified by subsequent conditions of the contract, and all its provisions must be construed together to arrive at its true intendment. They are interdependent in character, and none can be eliminated without destroy-

ing the contractual intendment and relationship of the parties. Should the hops be, from any cause, of lesser quality than choice, or not delivered in the condition agreed on, "according to the judgment" of Livesley & Co. or their agent, the contract accords them the privilege, nevertheless, of taking the same, or so many thereof as would be sufficient to cover the advances made on the crop, at a reduction in price of the difference in value between such hops and choice; and it was further stipulated that Livesley & Co. should, through their agent, have the right to determine at picking time whether or not the growing crop was in proper condition, and, if found not to be so, then that they should be relieved from making the stipulated advances of picking money. Thus analyzed, we are enabled to comprehend at a glance the essential features of the contract.

Now, the strong contention of counsel for defendants is that the stipulation that if the hops should be of lesser quality than choice, or not in condition as agreed upon, "according to the judgment" of Livesley & Co. or their agent, accorded to them the right or privilege of taking the crop, or not, subject to their mere will or caprice; thus nullifying their promise to purchase, and rendering it of no appreciable obligatory or binding effect upon them. And so with the contemplated advances of picking money. They assert that it was left entirely to their consideration, to be governed by their mere choice or pleasure in the premises. Ordinarily the purchaser of a commodity has the right of inspection upon delivery before acceptance, and, if it does not correspond in kind, quality, condition, or amount to that which is purchased or contracted for, he may reject it: Benjamin, Sales (7 ed.) §§ 695, 701; 2 Mechem, Sales, §§ 1210, 1211, 1375, 1376. The purchaser is conceded the exercise of his judgment, but he exercises it at his peril, and, if he rejects the com-

modity, which nevertheless comes up to the stipulated standard, he is yet bound for the purchase price, and the seller may recover it of him on proof that he has complied with the terms of the sale. Many cases are to be found where work is agreed to be done, articles furnished, or goods delivered upon sale, to the satisfaction of another, and it is uniformly held that the person to be benefited may exercise his choice of rejection or acceptance without assigning any reason therefor. That he ought to be satisfied, or that the work, articles, or goods would be satisfactory to a reasonable man or to a court or jury, will not avail as against the exercise of his convictions of sentiment. It is sufficient that he is not satisfied, and his own determination must be taken as final and conclusive. The cases proceed upon the assumption that the buyer has thus reserved to himself an unqualified option, not being willing to leave his freedom of choice to any contention or subject to any investigation whatever, and whatever decision he arrives at determines the controversy. If the question is one appealing to taste, sentiment, or artistic sensibility, as where the undertaking is to supply a portrait, bust, suit of clothes, musical instrument, article of furniture, or the like, it is, of course, the duty of the buyer to examine the subject of the purchase, and not to reject it unseen, but his determination upon examination cannot be questioned. Where, however, the agreement is to supply a machine which is to work to the satisfaction of the vendee, a reasonable test is required, and he must act in good faith and with honesty of purpose, and cannot be heard to express dissatisfaction which is wholly feigned or simulated. So it has been held in this class of cases that where the purchaser was in fact satisfied, but fraudulently and in bad faith declared that he was not, he is bound nevertheless, and must respond for the purchase price. "It is quite permissible," says Mr. Justice BRYAN, of the Supreme Court

of Maryland, "to parties to enter into such contracts; and where the approval or satisfaction of the party is made a condition precedent to the right to receive compensation, or the contract price, for the article to be delivered, the court has no right or power to dispense with the condition": *Baltimore & Ohio R. Co. v. Brydon*, 65 Md. 198, 226 (9 Atl. 126, 127, 57 Am. Rep. 318). And their validity seems to be unquestioned: 1 Mechem, Sales, §§ 663-668; *Campbell Print. Press Co. v. Thorp*, (C. C.) 36 Fed. 414, (1 L. R. A. 645); *Silsby Mfg. Co. v. Town of Chico*, (C. C.) 24 Fed. 893; *Zaleski v. Clark*, 44 Conn. 218 (26 Am. Rep. 446); *McCarren v. McNulty*, 7 Gray, 139; *Brown v. Foster*, 113 Mass. 136 (18 Am. Rep. 463); *Gibson v. Cranage*, 39 Mich. 49 (33 Am. Rep. 351); *Wood R. & M. Mach. Co. v. Smith*, 50 Mich. 565 (15 N. W. 906, 45 Am. Rep. 57); *Manufacturing Co. v. Brush*, 43 Vt. 528; *McClure v. Briggs*, 58 Vt. 82 (2 Atl. 583, 56 Am. Rep. 557)..

There is another class of cases where the article sold or the work to be done or performed is to be subject to the approval of, or to be satisfactory to, some third person, and in many instances that person is the agent or employé of one or the other of the parties to the contract. In cases of this character the approval of the party so designated becomes a condition precedent to a recovery for the price. He must, however, have acted in good faith and with an honest purpose, and cannot arbitrarily or capriciously exercise his judgment. If he violates his duty in this regard, a recovery may be had, in the absence of his approval, for the nonacceptance of the articles furnished. But in the absence of fraud or bad faith in the conduct of such party in respect of his approval or the withholding of it, his judgment or determination is to be accepted as final and conclusive. No mere error or mistake of judgment will vitiate his determination, the object of his appointment being to prevent and exclude conten-

tion and litigation. Such is said to be now the settled doctrine touching this class of contracts in the courts both of this country and England: *Baltimore & Ohio R. Co. v. Brydon*, 65 Md. 198 (57 Am. Rep. 318, 9 Atl. 126). See also, *Lynn v. Baltimore & Ohio R. Co.* 60 Md. 404 (45 Am. Rep. 741); *Kihlburg v. United States*, 97 U. S. 398; *Sweeney v. United States*, 109 U. S. 618 (3 Sup. Ct. 344); *Martinsburg & Potomac R. Co. v. March*, 114 U. S. 549 (5 Sup. Ct. 1035). We have had occasion to consider cases of this kind, of which *North Pac. L. & M. Co. v. East Portland*, 14 Or. 3 (12 Pac. 4); *Chance v. City of Portland*, 26 Or. 286 (38 Pac. 68); and *Vanderhoof v. Shell*, 42 Or. 578 (72 Pac. 126), are instances. In the latter case a building contract was involved, whereby it was stipulated that the builder should perform his work subject to the approval of the architect. Contracts of this nature are usual and frequent. The two former cases were concerning certain street improvements in the City of Portland, which were to "be completed to the satisfaction of the common council." In the first of these cases Mr. Justice THAYER, commenting upon the effect of the contract, says: "I think there must be a distinction between a contract in which the work is not to be paid for until a certificate is produced from some third person, showing that it has been performed in accordance with the provisions of the contract, and one in which it is to be paid for upon its approval and acceptance by the party for whom it is performed. In the former case the production of such certificate is a condition precedent to the right to demand the payment, and the party seeking to enforce payment must aver and prove its performance. In the latter case it is the duty of the party to approve and accept the work, if performed substantially as required by the contract, for certainly the law will not permit such party to capriciously withhold his approval in such case, and thereby avoid the payment of a just

claim." In *Baltimore & Ohio R. Co. v. Brydon*, 65 Md. 198 (57 Am. Rep. 318, 9 Atl. 126), the defendant agreed to furnish coal to the plaintiff of a quality that should be satisfactory to plaintiff's master of transportation and master of machinery, virtually its agent, and the stipulation was upheld, which is coming very near to the condition of the present contract. But in *Campbell Print. Press Co. v. Thorp*, 36 Fed. 414 (1 L. R. A. 645), Mr. Justice BROWN, who is now on the supreme bench of the United States, says, "We know of no reason of public policy which prevents parties from contracting that the decision of one or the other shall be conclusive;" and such was practically the case in *Fletcher v. New Orleans & N. E. R. Co.* (C. C.) 19 Fed. 731, and *Dustan v. McAndrew*, 44 N. Y. 72.

Within the undoubted doctrine of these cases, the contract under consideration was one which the parties had a right to enter into, and the clause leaving the quality and condition of the hops at the time of delivery to the judgment of the buyer does not render it void of mutuality. Livesley & Co. could not reject the hops upon mere whim or sheer volition, but must in good faith exercise an honest judgment in the premises, and unless they, by themselves or through their agent, so rejected them, they would nevertheless be bound for the price. Being a party and passing judgment upon their own case, good morals and decent propriety would suggest that they act with circumspection and a considerate regard for the rights of the seller as well as their own, and the law will look with greater scrutiny upon their determinations than if they were wholly disinterested arbiters. While this condition qualifies to a certain extent the promise to accept and pay for the hops, if choice in quality and in good condition, as agreed upon, it does not, by negation, destroy the efficacy of the promise. If the sale had been the ordinary one of goods or chattels,

the buyer, as we have seen, would have exercised his judgment as to rejection at his peril, and the goods or chattels could be shown notwithstanding to be of the quality and condition agreed upon. In a sale like the one at bar, the buyer must also accept, unless, in his honest judgment, exercised in absolute good faith, the commodity is not such as was contracted for. If so exercised, his determination becomes final, because the parties have so agreed ; but if he exercises his judgment arbitrarily, capriciously, or fraudulently, with the sheer purpose of avoiding his obligation to accept, it will not avail him, as the actual quality and condition of the hops may then be inquired into, notwithstanding his adverse determination. The undertaking of Livesley & Co. is not, therefore, a mere option to take the hops or not, but a positive obligation to purchase, unless, in their honest judgment, fairly exercised, they are not of the quality or in the condition contracted for. In the respect considered, we are firmly of the opinion that the contract is mutual and binding. If the hops are not, in their honest judgment, up to the agreed standard, then they are accorded the privilege or option of purchasing, or not, as they may desire ; and this provision, when compared with the one just discussed, indicates very clearly the distinction that exists, and that which the parties themselves declared, between the agreement to purchase and a mere option to purchase, as may suit the wish of the buyer.

The same considerations apply alike to the obligation to advance picking money. It was not left to the mere option of Livesley & Co. to advance such funds as and when they saw fit, but they or their agent must pass an honest judgment as to whether or not the crop is in the proper condition ; that is, for the production of such hops as is bargained for. The purpose of this stipulation is apparent. Livesley & Co. would hardly be expected to advance money upon a contemplated product when it was manifest that it

would not come up to the standard in quality contracted for, and would furnish, at best, doubtful security for the repayment of the advances. But aside from these considerations, there is the obligation to advance \$250 on or about April, May, and June of each year for cultivating purposes, which is unconditional; and when all the conditions are construed together, including the chattel-mortgage element, which is intended as security for repayment of advances made in case a sale is not consummated, we are impelled to the conclusion that the contract is mutual, and therefore valid and binding upon the respective parties. In view of these considerations, it is not necessary for us to determine whether or not, if the contract of Livesley & Co. was a mere option to purchase, it is supported by a sufficient consideration. Nor have we considered what would be the effect on the sale had Livesley & Co. declined to advance picking money, as it does not seem to be involved in the present controversy.

3. The next question presented is whether a court of equity has jurisdiction to decree a specific performance, by requiring a delivery of the crop of hops produced for the year 1903, to the amount of 20,000 pounds. It may be said that equity will not ordinarily grant relief for the specific delivery of chattels, because it is generally considered that the plaintiff has a plain, speedy, and adequate remedy at law for damages for withholding them. The interposition of equity is not withheld except upon this particular ground, as its jurisdiction is as ample to decree the specific performance of an agreement relative to personality as it is one relative to realty: *Sullivan v. Tuck*, 1 Md. Ch. 59; *Frue v. Houghton*, 6 Colo. 318; *Duff v. Fisher*, 15 Cal. 376; *Mechanics' Bank v. Seton*, 26 U. S. (1 Pet.) 299; *Mason v. Patterson*, 74 Ill. 191; *Kirksey v. Fike*, 27 Ala. 383 (62 Am. Dec. 768); *Barnes v. Barnes*, 65 N. C. 261. The

remedy at law, however, which will bar such relief, must be as practical and efficient to the ends of justice and its prompt administration as in equity, or, to employ the language of Mr. Chief Justice FULLER in *Gormley v. Clark*, 134 U. S. 338, 339 (10 Sup. Ct. 554, 557): "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances": *South Port. L. Co. v. Munger*, 36 Or. 457 (54 Pac. 815, 60 Pac. 5); *Benson v. Keller*, 37 Or. 120 (60 Pac. 918); *Wollenberg v. Rose*, 41 Or. 316 (68 Pac. 804); *Brett v. Warnick*, 44 Or. 511 (75 Pac. 1061). When, therefore, an award of damages would not put the party seeking equitable relief for the delivery of personalty in a situation as beneficial as if the agreement were specifically performed, or where compensation and damages would fall short of the redress to which he is entitled, the jurisdiction is properly invoked; otherwise not: *Frue v. Houghton*, 6 Colo. 318; *Avery v. Ryan*, 74 Wis. 591 (43 N. W. 317); *McGowin v. Remington*, 12 Pa. 56 (51 Am. Dec. 584).

4. And it may be further observed that the insolvency of the party against whom relief is sought, standing alone, will not confer jurisdiction to enforce specific performance in this class of cases. There must be some other element or principle of equitable cognizance upon which the remedy is invoked: *Gillett v. Warren*, 10 N. M. 523 (62 Pac. 975); *McLaughlin v. Piatti*, 27 Cal. 451; *Cincinnati & C. R. Co. v. Washburn*, 25 Ind. 259. The fact of insolvency, when combined with other causes for equitable interposition, may, however, become a potent or even controlling factor in determining the fact of jurisdiction. The principle is well stated by Mr. Justice THOMPSON in *Heilman v. Union Canal Co.* 37 Pa. 100, 104, as follows: "The fact, if it be so, that this remedy may not be successful in realizing the fruits of a recovery at law, on account of the

insolvency of the defendants, is not of itself a ground of equitable interference. The remedy is what is to be looked at. If it exist, and is ordinarily adequate, its possible want of success is not a consideration. It is not intended here to say that insolvency is never a consideration moving a chancellor. It frequently does, but not alone. The equitable remedy must exist independently. In balancing cases, it is a consideration that gives preponderance to the remedy." To the same purpose, see *Clark v. Flint*, 22 Pick. 231 (33 Am. Dec. 733); *Parker v. Garrison*, 61 Ill. 250.

5. Now, turning to the contract in question, and considering the situation and relation of the parties, do we not find independent grounds for equitable interference to grant relief by way of specific performance? We have already discussed the salient features, terms, and conditions of the contract, and have found it to be valid and binding between the parties. It covers a period of five years, and was made at a time, presumably, when Johnston was obtaining fair value for his hops—otherwise we must assume that he would not have entered into the relationship—and there is only one reason at this date why it may be considered to be a hard contract as to him, and that is that hops are worth more now in the market than they were then. Another suggestion in this connection: The commodity fluctuates greatly in the market, and it may have been a controlling circumstance that Johnston considered that 9½ cents per pound for the hops raised by him during the five years designated would be a good average price for the time, and hence, upon the whole, a profitable undertaking. But the undertaking to produce the hops was not solely his own. Under the agreement, Livesley & Co. were to contribute to the expense of their production; that is to say, they were to advance money for the purposes of cultivating and picking, amounting to more than one half of the agreed value of the product, which was to be-

come a lien thereon. In a sense, the venture was a joint one between the parties, where one was to provide the ground and bestow his labor, and the other to furnish the necessary funds for carrying it on ; the latter to be reimbursed their advances, with interest, in any event, however. The condition suggests a trust relationship between the parties, whereby the producer becomes, in a manner, a trustee of the buyer for the delivery of the product of the joint enterprise to the amount designated, and the contract has reference to the specific property to be produced under its terms. Further than this, it is alleged that plaintiffs surrendered to Johnston his promissory notes to the amount of \$650 as part consideration for his entering into the contract, and an award of damages would not fully compensate them. Coupling these conditions with the fact alleged that the defendant is insolvent, so that a judgment at law against him would be bootless and utterly insusceptible of enforcement, we are constrained to resolve the question in favor of the equitable jurisdiction to enforce the specific performance of the contract.

It is further urged that the remedy is not reciprocal, and ought not, therefore, to be sanctioned. But it seems clear that Johnston would also have a remedy to enforce specific performance, should Livesley & Co. capriciously and fraudulently refuse to approve of the hops, as to quality and condition, or to accept them, as there would be involved the question of fraud, which is especially within the cognizance of equity, and the procedure would be more efficient to the ends of justice than an action for damages for a breach of their obligation.

We are not to be understood as holding that the defendant may be required to perform the labor or carry on the project of producing the crops, but, after they have been produced, and the plaintiffs have contributed to their production as required by the terms of the agreement, or have

at all times been ready and willing to do so, and have only been deterred therefrom by the acts of Johnston, they are entitled to have specific performance in delivery of the amount of the crop so agreed to be delivered.

6. Another point is made—that the complaint does not show that Johnston owned the land upon which the hops were grown, or held it under a lease, so as to give him a potential interest in the crop produced. But the reasonable inference is that he had it rented. The agreement shows that it was owned by Frank and Melane Chappelle and Peter Deltaur, and Johnston must have acquired some right from them to cultivate it—presumably by lease.

7. And still another—that the complaint does not allege that hops of the kind were grown or owned by the defendant Johnston. If, however, the plaintiffs are willing to accept the hops he has produced as of the quality and condition agreed upon, the defendants cannot be heard to complain.

In view of these considerations, the decree of the trial court will be reversed, the demurrer overruled, and the cause remanded for such further proceedings as may seem proper.

REVERSED.

Decided 18 June; rehearing denied 8 October, 1904.

FIREMAN'S INS. CO. v. OREGON RAILROAD CO.

[76 Pac. 1075, 67 L. R. A. 161.]

FIRE INSURANCE—SUBROGATION—JOINT ACTION AT LAW.*

Where an insurer pays a loss under a policy of fire insurance in a less amount than the insured's loss by fire, and takes a subrogation assignment for the sum paid, the insurer and the insured, under B. & C. Comp. §§ 27 and 393, requiring actions at law and suits in equity to be prosecuted in the name of the real party in interest, may jointly maintain an action at law against a wrongdoer who negligently caused the loss.

* NOTE.— An action at law is the proper remedy by an insurance company on being subrogated to a claim against the party whose negligence caused the loss: *St. Louis A. & P. R. Co. v. Fire Assoc.* 28 L. R. A. 83. See, also, note: Right of Insurer to Subrogation—Proper Parties Plaintiff, 44 Am. St. Rep. 731, 738.

From Umatilla: WILLIAM R. ELLIS, Judge.

The plaintiff the Northwestern Warehouse Company being the owner of a quantity of wheat stored at Barnhart Station, in Umatilla County, insured it with its coplaintiff, the Fireman's Fund Insurance Company, in the sum of \$1,250, which was less than its value. The wheat was destroyed by fire, which, it is alleged, originated through the negligence of the defendant company, the Oregon Railroad and Navigation Company. The insurance company paid the warehouse company the amount of the insurance, and, by articles of subrogation, took an assignment of all right or claim which the latter company had by reason of the damages sustained, to the extent of the amount so paid, and both companies join in an action against the railroad company for the entire amount of damages sustained by reason of the fire. Sam Davis was the owner at the same time of a quantity of wheat which was also destroyed. Having since assigned his claim for damages against the railroad company to plaintiffs, they sue upon this demand, also, as a second separate cause of action. A demurrer was interposed to each of these causes of action, but, being overruled, judgment was rendered against the defendant, from which it appeals.

AFFIRMED.

For appellant there was an oral argument by *Mr. William W. Cotton* and *Mr. Henry F. Connor*, with a brief over the names of *Cotton, Teal & Minor, Carter & Raley*, and *H. F. Conner*, to this effect.

Assuming the wheat to have been burned by defendant's negligence, this gave rise to a single and indivisible cause of action at law in favor of the warehouse company: *Swarthout v. Chicago & N. W. R. Co.* 49 Wis. 625 (6 N. W. 314); *Ætna Ins. Co. v. Hannibal & St. Jo. R. Co.* Fed. Cas. No. 96 (3 Dill. 1); *Norwich Union F. Ins. Soc. v. Standard Oil Co.* 59 Fed. 984 (8 C. C. A. 433, 19 U. S. App. 460); *Over*

v. *Lake Erie & W. R. Co.* 63 Fed. 34; *Field v. Mayor of New York*, 6 N. Y. 179 (57 Am. Dec. 435); *Cook v. Genesee Mut. Ins. Co.* 8 How. Prac. 514.

This cause of action cannot be split without defendant's consent, so as to give two rights of action at law; and no consent of the defendant to the partial assignment is alleged: *Grain v. Aldrich*, 38 Cal. 514 (99 Am. Dec. 423); *Ætna Ins. Co. v. Hannibal & St. Jo. R. Co.* Fed. Cas. No. 96 (3 Dill. 1); *Mandeville v. Welch*, 18 U. S. (5 Wheat.) 277, 288; *Field v. Mayor of New York*, 6 N. Y. 179 (57 Am. Dec. 435); *Cook v. Genesee Mut. Ins. Co.* 8 How. Prac. 514.

No action at law can be maintained in the name of the assignor of a part of a cause of action set out in the first cause of action for his own benefit and that of his assignee: B. & C Comp. § 27; 1 Pomeroy, Rem. Rights, § 126; *Field v. Mayor of New York*, 6 N. Y. 179 (57 Am. Dec. 435).

By the subrogation no legal title in the cause of action or any part thereof was acquired by the insurance company. The interest acquired by it is purely equitable, and enforceable only in equity: *Norwich Union F. Ins. Soc. v. Standard Oil Co.* 59 Fed. 984 (8 C. C. A. 433, 19 U. S. App. 460); *Over v. Lake Erie & W. R. Co.* 63 Fed. 34; *Grain v. Aldrich*, 38 Cal. 514 (99 Am. Dec. 423); *Hassie v. God Is With Us Cong.* 35 Cal. 378; *State Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 563 (26 Pac. 838); 1 Pomeroy, Eq. Jur. §§ 146, 148; *Little v. Portland*, 26 Or. 235 (37 Pac. 911); 7 Enc. Pl. & Pr. p. 763; *Field v. Mayor of New York*, 6 N. Y. 179 (57 Am. Dec. 435); *Cook v. Genesee Mut. Ins. Co.* 8 How. Prac. 514; *Sykes v. First Nat. Bank*, 2 S. D. 242 (49 N. W. 1058); *James v. Newton*, 142 Mass. 366 (56 Am. Rep. 700, 8 N. E. 122); *Childs v. Alexander*, 22 S. C. 169; *The Elmbank*, 72 Fed. 610; *Etheridge v. Vernoy*, 74 N. C. 800.

The distinction between actions at law and suits in equity still exists in Oregon: *Burrage v. Bonanza G. & Q. Min. Co.* 12 Or. 169 (6 Pac. 766); *Beacannon v. Liebe*, 11 Or. 443 (5

Pac. 273); *Over v. Lake Erie & W. R. Co.* 63 Fed. 34; *Scott v. Neely*, 140 U. S. 106 (11 Sup. Ct. 712); *Cates v. Allen*, 149 U. S. 451 (13 Sup. Ct. 883, 977).

For respondent there was an oral argument by *Mr. John J. Balleray*, with a brief over the name of *Balleray & McCourt*, to this effect.

An action at law lies by an insurance company against a wrongdoer for damages by which the property of a person injured by such company has been damaged or destroyed by such wrongdoer, to the extent of the amount paid by the insurer, he being subrogated, as a matter of law, to the rights of the owner: *Swarthout v. Chicago & N. W. R. Co.* 49 Wis. 625 (6 N. W. 314); *Pratt v. Radford*, 52 Wis. 114 (8 N. W. 606); *Allen v. Chicago & N. W. R. Co.* 94 Wis. 93 (68 N. W. 873); *Connecticut F. Ins. Co. v. Erie R. Co.* 73 N. Y. 399 (29 Am. Rep. 171); *State Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 563 (26 Pac. 838); *Home Mut. Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 569 (23 Am. St. Rep. 151, 26 Pac. 857).

Where injury by a wrongdoer to property insured exceeds the value of the insurance, and the insurer pays the amount of the insurance, but one cause of action arises from the wrongful act, and the insured or owner and insurer must join in one action to recover the amount of damages so occasioned by the wrongdoer: *Pratt v. Radford*, 52 Wis. 114 (8 N. W. 606); *Swarthout v. Chicago & N. W. R. Co.* 49 Wis. 625 (6 N. W. 314); *Home Mut. Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 569 (23 Am. St. Rep. 151, 26 Pac. 857); *State Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 563 (26 Pac. 838); *St. Louis S. W. R. Co. v. Miller*, 27 Tex. Civ. App. 344 (66 S. W. 139).

A claim or chose in action arising out of a tort, except rights for such injuries as die with the person, is assignable, and the assignee may maintain an action thereon in

his own name: B. & C. Comp. §§ 27, 29, 379, 380; Hill's Ann. Laws, §§ 27, 29, 369, 370, note to § 27, pp. 139, 150; Pomeroy, Rem. Rights, §§ 146, 148; *Zabriskie v. Smith*, 13 N. Y. 322 (64 Am. Dec. 551); *Butler v. New York & E. R. Co.* 22 Barb. 110; *McArthur v. Green Bay & M. C. Co.* 34 Wis. 152; *State Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 563 (26 Pac. 838); *Home Mut. Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 569 (23 Am. St. Rep. 151, 26 Pac. 857).

Where all parties interested in one legal demand, however numerous they may be, join in an action at law, they can recover upon such demand: *Swarthout v. Chicago & N. W. R. Co.* 49 Wis. 625 (6 N. W. 314); *Pratt v. Radford*, 52 Wis. 114 (8 N. W. 606); *Allen v. Chicago & N. W. R. Co.* 94 Wis. 93 (68 N. W. 873); *Connecticut F. Ins. Co. v. Erie R. Co.* 73 N. Y. 399 (29 Am. Rep. 171); *Home Mut. Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 569 (23 Am. St. Rep. 151, 26 Pac. 857); *State Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 563 (26 Pac. 838); *Hart v. Western R. Corp.* 13 Metc. 99 (46 Am. Dec. 719); *Monmouth County Mut. F. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion of the court.

The questions for our consideration arise upon the demurrer. The first ground of demurrer as to each cause of action is that the complaint does not state facts; the second ground, as to the first cause, is that the plaintiffs' right of action is equitable; the third, that plaintiffs have attempted to unite an equitable cause of suit in favor of the insurance company with another equitable cause in favor of the warehouse company; and the fourth, that two causes of action—one in favor of each plaintiff—are improperly united. The second ground of demurrer to the second cause of action is that such cause has been improperly united with the causes of action contained in

the first count. The demurrer also goes to the entire complaint on two grounds: *first*, that several causes of action have been improperly united; *second*, that a cause of action at law has been united with two equitable causes of suit. Error is assigned in overruling the demurrer as to each of the grounds designated, but the real and crucial objections center about the first count or cause of action; the latter being unobjectionable, except that it is attempted to be combined with the first in one action.

It is insisted that plaintiffs have mistaken the forum, and that they should have proceeded upon the equitable side of the court, and not at law. This is the sum and substance of the whole controversy, and we will discuss it singly, without confusing it, if possible, with the other seemingly inconsistent grounds assigned by the demurrer. The contention is that the claim or demand arising from the destruction of the wheat through the negligence of the defendant was one wholly in favor of the warehouse company and against the defendant, purely legal in character, single and indivisible, and was insusceptible of assignment at law, except in its entirety; that it was assignable in part or by piecemeal alone in equity; that the alleged assignment was not of a joint or undivided interest, but of a separable or distinct part or portion of the claim or demand; and that its legal effect was so to split up the cause of action that neither company could enforce its right acquired or remaining, either singly or collectively, in a court of law, but could only have redress in a court of equity. It may be premised that it is the distinction between forms of action at law that is abolished by our Code, not that which formerly existed between actions of law and suits in equity. Although administered by the same court or tribunal, the latter distinction still remains, and the cause is only cognizable in law or in equity as the especial facts will warrant: *Beacannon v.*

Liebe, 11 Or. 443 (5 Pac. 273); *Burrage v. Bonanza G. & Q. Min. Co.* 12 Or. 169 (6 Pac. 760). But, whether the cause be an action or suit, the rule is the same; requiring it to be prosecuted in the name of the real party in interest: B. & C. Comp. §§ 27, 393. It is settled law that a party having an entire demand against another cannot split it up so as to subject the debtor to several actions, and, if he sue for a part only of such demand, the judgment obtained will operate to bar any further recovery. Nor can he assign a part only, so as to confer a right of action upon the purchaser, unless the debtor assents to it, in which event there arises a new and distinct contract or assignment; being sustained by the debtor's promise to the assignee, which operates to discharge the debtor of the original debt *pro tanto*. The reason assigned for the principle is that the debtor's undertaking is to pay an integral sum to his creditor, it being no part of his contract that he shall pay in fractions or by piecemeal, either to the creditor or his assignees; hence he has the right to stand upon the singleness of his original obligation, and cannot be subjected, without his consent, to divers actions and embarrassments not contemplated thereby, as would otherwise be the case: *Mandeville v. Welch*, 18 U. S. (5 Wheat.) 277; *Grain v. Aldrich*, 38 Cal. 514 (99 Am. Dec. 423); *James v. Newton*, 142 Mass. 366 (8 N. E. 122, 56 Am. Rep. 692).

Assignments of choses in action or legal demands were anciently unknown to the common law. Latterly, however, they have been treated as merely equitable, but as conferring the right to use the name of the assignor, and thereby to authorize a recovery by an action at law. This relates to the entire demand. But our Code has changed the rule, and the procedure is more direct, requiring all actions to be prosecuted in the name of the real party in interest; thus treating the assignment as legal, and as con-

ferring a legal right upon the assignee, not only as it respects the title to the demand, but in regard to the manner of its enforcement also. A partial assignment may be said to be good at law between the parties, for, if the assignor should collect the funds, he would be regarded as holding it in trust for the assignee. It is such a demand, however, as is cognizable in equity as between all the parties—the debtor as well as the creditor and the assignee. It confers not a legal, but an equitable, right in the demand, enforceable alone in equity; the legal title remaining in the assignor, so that logically the assignee must go into a court of equity to enforce his claim, and, under the code practice, must prosecute the suit in his own name, he being the real party in interest. It is said that in a court of equity “the objections to a partial assignment of a demand, which are formidable in a court of law, disappear. In equity the interests of all parties can be determined in a single suit. The debtor can bring the entire fund into court, and run no risks as to its proper distribution. If he be in no fault, no costs need be imposed upon him, or they may be awarded in his favor. If he be put to extra trouble in keeping separate accounts, he can, if it is reasonable, be compensated for it. In many ways a court of equity can, while a court of law, with its present modes, cannot, protect the rights and interests of all parties concerned”: *Exchange Bank v. McLoon*, 73 Me. 498, 505. The subject is exhaustively treated in this case, and also in a masterly opinion by Judge MORROW in the case of *The Elmbank* (D. C.) 72 Fed. 610. See, also, *Texas West. Ry. Co. v. Gentry*, 69 Tex. 625 (8 S. W. 98); *Cook v. Genesee Mutual Ins. Co.* 8 How. Prac. 514; *Superintendent of Schools v. Heath*, 15 N. J. Eq. 22. So that the rule against the splitting up of a demand, and denying the assignee a right of action for a part only of the claim, does not deny the right to sell and transfer an undivided part thereof, or

militate against or inhibit the enforcement of the right of such an assignee in a court of equity ; and, if all the owners unite in one suit upon it, the fact of the assignment of a part constitutes no defense: *Whittemore v. Judd L. & S. Oil Co.* 124 N. Y. 565 (27 N. E. 244, 21 Am. St. Rep. 708).

Now, arguing from these principles and premises, defendant contends that the insurance company, by its subrogation assignment, has but an equitable interest in the demand of the warehouse company against the defendant for the damages, enforceable alone in equity, and that there remains but an equitable interest in the warehouse company, enforceable alike only in equity, and that, though the insurance company and the warehouse company have joined as plaintiffs, the proceeding is still equitable, and not one cognizable in a court of law. It should be remarked in this connection that the alleged assignment confers no greater right than was conferred by operation of the subrogation to which the insurance company was entitled after having paid the amount of its insurance. Plaintiffs' counsel, upon the other hand, contend that, having united their interest by joining as plaintiffs in a common cause, the proceeding is at law, and not in equity, and was rightfully maintained. This points the exact difference between the parties. If a part, being assigned, should be re-assigned to the original owner, or the owner should assign the balance of his demand to the assignee of a part, the remedy for the enforcement of the whole would undoubtedly be in a court of law, and the objection that the cause had been split could not obtain, as the action would be single, and not contrary to the obligation of the debtor. The equities carved out of the legal entity would thus disappear, and become again merged in the holder of the entire demand, and he would be relegated to a court of law. The argument of counsel for plaintiffs is that the same result would, in effect, follow if the parties all joined as plaintiffs to en-

force the demand. Whether this is so as a general rule we are not called upon to inquire, but that it is so in a case like the present seems to be supported by authority. The relations existing between the insured and the insurer are peculiar in themselves. In respect to the ownership of the property, and the risk incident thereto, from the time of the insurance, the insurer has a pecuniary interest in the thing insured, and the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from one who is responsible for the loss. The insurer stands practically in the position of surety to the owner, stipulating that the property should not be lost or destroyed in consequence of the peril insured against, and whenever he has indemnified the owner for the loss he is entitled to all the means for indemnity which the satisfied owner held against the party primarily liable. The right rests upon familiar principles of equity—the doctrine of subrogation, which is dependent not at all upon privity of contract, but is worked out through the inherent right of the owner or creditor.

“The liability of the railroad company is, in legal effect,” says Mr. Chief Justice SHAW, in a case similar to the present, “first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability”: *Hart v. Western R. Corp.* 13 Metc. (Mass.) 99, 105 (46 Am. Dec. 719). To the same purpose, see also, *Hall v. Railroad Co.* 80 U.S. (13 Wall.) 367; *St. Louis, I. M. & S. Ry. Co. v. Commercial Ins. Co.* 139 U.S. 223 (11 Sup. Ct. 554); *Norwich Union Ins. Soc. v. Standard Oil Co.* 59 Fed. 984 (8 C. C. A. 433). The subrogation is not the equivalent of an assignment. It is the putting of one party in the place of another—the party who pays the debt in the place of the creditor—allowing the former to enter into the rights of the latter: Bouvier's Law Dict.; *Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co.* (C. C.) 41 Fed. 643. If the insurance equals or

exceeds the amount of the loss, and the loss is wholly paid by the insurer to the owner, the subrogation operates as an equitable assignment, and gives to the insurer a right of action at law, which he could formerly maintain under the common law in the name of the insured, but which he must now maintain under the Code in his own name; he being the real party in interest. The owner, having no interest remaining, is without any right of action, nor can he by any act of his defeat the right of the insurer: *Connecticut F. Ins. Co. v. Erie R. Co.* 73 N. Y. 399 (29 Am. Rep. 171); *Swarthout v. Chicago & N. W. Ry. Co.* 49 Wis. 625 (6 N. W. 314); *Pratt v. Radford*, 52 Wis. 114 (8 N. W. 606); *Allen v. Chicago & N. W. Ry. Co.* 94 Wis. 93 (68 N. W. 873); *Norwich Union Ins. Soc. v. Standard Oil Co.* 59 Fed. 984 (8 C. C. A. 433). So, the rule was formerly declared to be that, when the value of the property exceeds the insurance money paid, the action must be brought in the name of the assured: *Ætna Ins. Co. v. Hannibal & St. Jo. R. Co.* 3 Dill. 1; *Norwich Union Ins. Soc. v. Standard Oil Co.* 59 Fed. 984 (8 C. C. A. 433), and cases there cited. In such case, "an assignment of the claim," says Mr. Wood, "cannot be enforced, but the assured becomes trustee for the insurer, and by necessary implication the payment of the loss operates as an equitable assignment to the insurer to the extent of the sum paid under the policy": 2 Wood, Ins. (2 ed.) § 499. This by right of subrogation, for the learned author is discussing the doctrine as invoked in insurance cases. The result is that there is not a splitting of the claim, either in a legal or equitable sense. The insurer, it is true, acquires an interest in the claim purely equitable, but he bears the relationship of *cestui que trust* to the insured as trustee. The interest acquired is with the owner, and in the cause of action that he has, but it does not give rise to a new and separate cause of action. Thus the insurer and the insured become jointly inter-

ested in a single liability or cause of action, and united they are the real parties in interest, and entitled in that capacity to prosecute a joint action against the wrongdoer. Until the loss is paid, the insurer can have no right of action against the wrongdoer, but, having paid it, he is subrogated to the right of the insured to the extent of the payment. If it covers the entire loss, his right of action becomes absolute at law, and he must now bring it in his own name; but, if it covers a part only, his subrogation entitles him to an interest merely equitable, which he has and holds in joint capacity with the assured, and they together may maintain an action for the entire loss against the wrongdoer. Such has been the determination of this court in two cases: *State Ins. Co. v. Oregon Ry. & Nav. Co.* 20 Or. 563 (26 Pac. 838), and *Home Mut. Ins. Co. v. Oregon Ry. & Nav. Co.* 20 Or. 569 (26 Pac. 857, 23 Am. St. Rep. 151).

It is insisted, however, that what was said in those cases upon the subject was not necessary to a determination of the controversy involved, and therefore that they are not authoritative as precedents. In the State Insurance Company Case, the precise question was whether the company, having paid under its policy of insurance, being but a part of the loss sustained, could prosecute an action singly against the railroad company for the amount paid by it to the assured, and it was held that it could not. The very same contention, however, was maintained by counsel for the railroad company at the hearing there as is urged here, and in response thereto the court, speaking through Mr. Justice LORD, said: "There is but one wrongful act complained of, causing one loss and creating but one liability. It is a single wrongful act, giving rise to but one liability upon a claim which is indivisible. It is immaterial whether the insurer acquires his right or interest by subrogation or assignment. When the property de-

stroyed exceeds the value of the insurance money paid, he only acquires a joint right or interest with the owner of such property in a single cause of action or liability. Where there is but one liability or cause of action, those united in interest must adjust their loss in a single action." And again: "While at common law this liability would be enforced in the name of the insured, under the Code, except where the insurance company has paid the full value of the property, the loss of which was occasioned by the negligent act complained of, and the insurer (insured) by reason thereof has no interest, the insurer and owner of the property may join to recover the whole loss in one action. Together they have a united interest in a single cause of action or liability to which the negligent act of the defendant gave rise. The insurer acquires, not a new and separate cause of action, but only a right or interest with the owner of the property in a single cause of action or liability, and cannot, therefore, in such case, sue in his own name alone. It is upon this principle, which preserves the indivisibility of the action arising out of one loss and one liability, that under the old practice the action would have been brought in the name of the insured for the benefit of all concerned; but, the Code requiring the action to be brought in the name of the real party in interest, the insurance companies and owners of the property destroyed, constituting such party, would have to join in the recovery. In other words, the insurance companies would join the owner in bringing one action to determine the liability of the defendant." If the issue did not really arise from the facts of the case, it was argued and insisted upon, and was at least germane to a discussion of the real question; and, having received careful consideration, the determination is persuasive and forcible as argument, if not, in legal effect, as a precedent.

The Home Mutual Insurance Company Case was a similar action. The defendant answered that the owner had previously sued the railroad company for the damages occasioned by its negligence, and had recovered; that the railroad company had paid the judgment in full, whereby the owner had been fully compensated; and that he held the money thus obtained in trust for the insurer; and, for a further defense, set up that by virtue of the commencement of the action the insurance company had full knowledge of the destruction of the property, that the action was about to be commenced, and was requested by the owner to prosecute or join with him in the action, but refused, and disclaimed any interest therein, and that the defendant had not, prior thereto or at the time of the commencement or trial of said action in the trial court, any knowledge of the insurance, or that the insurance company had paid the assured anything upon his policy. To each of the separate answers a demurrer was filed and overruled, and the question in this court was as to the correctness of the rulings. It will be noted that the further answer did present the question whether the owner should be joined with the insurance company in bringing the action. What the contention of the counsel was at the hearing, the record does not disclose, but the court, again speaking through Mr. Justice LORD, after an exhaustive review of the authorities, said: "From all this the conclusion results that, where the wrongful act is single and indivisible, there can be but one liability or cause of action. Since the Code, the cause of action remains as before, single and indivisible, and the insurer acquires only a right or interest with the owner of the property in the cause of action or liability, and not a new and separate cause of action. He cannot, therefore, sue in his own name alone, in any case, under the Code, except where the amount paid by him has exceeded or equaled the value of the property de-

stroyed, and no interest remains in the owner. When the amount of the insurance money paid is less than the value of the property destroyed by the negligent act, all the authorities agree that the insurer must either sue in the name of the insured, or join with him in bringing an action against the wrongdoer. None allows that in such case he can sue in his own name alone, for the reason that the wrongful act is single and indivisible, and gives rise to but one liability or cause of action. In that cause of action he acquires a joint right with the owner therein, and not a new and separate right of action, and therefore must prosecute it jointly with him. They have a joint interest in a single liability, and united are the real parties in interest." Thus it is that the principles and doctrines here discussed have received ample and exhaustive consideration in these cases, and the conclusion reached is so cogent and impressive that we feel bound by it, and hence conclude that this case was properly instituted by the insurer and assured jointly. The judgment was single against the defendant, and what is said in the complaint as to the damages sustained respectively by the joint plaintiffs did not change the nature of the action, and, being mere surplusage, was properly disregarded. These considerations affirm the judgment of the trial court, and it is so ordered.

AFFIRMED.

Decided 1 March, 1904.

McLEOD v. LLOYD.

[75 Pac. 702.]

IMPEACHING DECREE BY CORRECTING MANDATE—BILL OF REVIEW.

Where it is claimed that the enforcement of a judgment or decree will be inequitable, owing to occurrences since its rendition, or the discovery of testimony that would probably have produced a different result in the case, and reasonable diligence has been used, the remedy is not by a motion to recall or modify the mandate, but is by an original suit of impeachment in the nature of a bill of review.

Appealed from Lane County.

45	67
48	48

This a second motion to recall the mandate.*

OVERRULED.

Mr. Francis D. Chamberlain for the motion.

No appearance *contra*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is an alias motion to recall a mandate. It is stated by appellant's counsel that the land, the title to which is alleged to have been clouded, lies in Douglas and not in Lane County, as averred in the complaint, which fact was not discovered until after the decree in this court was rendered; that the defendant, for a valuable consideration, and without knowledge of the plaintiff's claim, purchased the premises in good faith, and caused the deeds to be recorded in Douglas County, before plaintiff's deeds were recorded therein, thereby securing the superior title; that the mandate issued in pursuance of the decree of this court states that plaintiff is the absolute owner of the lands; that the deeds therefor executed to the defendant are void, and should be canceled; and that he is enjoined from asserting any interest in the premises. An application is made for an order recalling the mandate, that another may be issued, directing the trial court to take such further proceedings in this suit as may be necessary, not inconsistent with the opinion, or that the new mandate shall not preclude the defendant from asserting, either in this suit, or in any other action or proceeding, any rights he may have acquired by reason of his having secured the prior record of his deeds in the proper county.

It was held on the former application to recall the mandate that it was discretionary with this court either to enter a final decree, or to remand the suit for further proceed-

*NOTE.—This opinion was not rendered until after the prior opinions herein had been officially published, or it would have been printed with them: *McLeod v. Lloyd*, 42 Or. 200.—REPORTER.

ings, and a final decree having been entered on appeal herein, and a petition for a rehearing overruled, the right of the defendant to answer in this suit is thereby concluded: *McLeod v. Lloyd*, 42 Or. 260 (74 Pac. 49). If, since the cause was brought to this court, the defendant's ascertainment of the boundary between Lane and Douglas counties may be regarded as newly discovered evidence, his remedy is not to open the decree that was affirmed in this court, but to vacate it by instituting an original suit for that purpose: B. & C. Comp. § 391; *Crews v. Richards*, 14 Or. 442 (13 Pac. 67); *Nessley v. Ladd*, 30 Or. 564 (48 Pac. 420); *Hilts v. Ladd*, 35 Or. 237 (58 Pac. 32). "The law relative to bills of review," says Mr. Justice GABBERT, in *Warren v. Adams*, 26 Colo. 404 (60 Pac. 632), "is based upon Lord Bacon's ordinance, which provided: 'No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review, and no bill of review shall be admitted except it contain * * some new matter which hath arisen in time after the decree, and not any new proof which might have been used when the decree was made. Nevertheless, upon new matter that has come to light after decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be granted by the special license of the court, and not otherwise.' On the question of diligence, the rule is that, in order that new matter may be made available as a basis for a bill of review, it must appear that it was not known to the party pleading it, or his counsel, in time to have been brought forward and used in the former trial, and that by the exercise of reasonable diligence it could not have been discovered or produced in that suit." In the notes to the case of *Little Rock, etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 216, it is said: "The enforcement of a judgment may be inequitable, either because it was against equity and good conscience to enforce it from the very beginning,

or because, though its enforcement was at one time proper, subsequently occurring circumstances have changed the relations of the parties, and made it inequitable to insist upon its further execution." If, therefore, the decree of this court, though proper when rendered, has become inequitable in consequence of the defendant's subsequent ascertainment of the boundary between these counties, and the prior recording of his deeds in Douglas County, and such discovery could not have been made, by the exercise of reasonable diligence, in time to interpose the fact as a defense in the trial of this suit, the remedy is by an original suit to set aside the final decree of this court, and the mandate heretofore issued will afford no bar to its prosecution, so that no necessity exists for recalling the mandate, and the motion should be overruled, and it is so ordered.

OVERRULED.

Argued 15 March, decided 16 May, 1904.

KELSAY v. EATON.

[76 Pac. 770.]

DEVISABILITY OF TIMBER CULTURE CLAIMS—STATUTES.*

An entryman under the timber culture act of the United States has no devisable interest in the entered land until the issuance of the final certificate. If he dies in the mean time, his heirs, upon certain conditions, may obtain the land, but they will take as donees of the government by purchase, and not through the original settler by descent. There is a difference in this respect between the homestead and timber culture acts: *Church v. Adams*, 37 Or. 355, distinguished.

- From Sherman: W. L. BRADSHAW, Judge.

This is a suit by B. S. Kelsay against Alexander Eaton and others to quiet the title to real property. The facts are that, under the provisions of the timber culture act of the United States, one J. H. Eaton entered 80 acres of land in Sherman County; that, before making final proof, he died unmarried, and without issue, having devised all his

* NOTE.—See *Wilcox v. John*, 52 Am. St. Rep. 246, 249, for note, Encumbrances by Preemptors and Other Claimants of Public Lands.—REPORTER.

real and personal property to plaintiff, who was named as his executor; that the will was admitted to probate in that county, and letters testamentary were issued to plaintiff, who, having duly qualified, made such proof as testamentary heir; that the patent for the land was issued to the heirs of the testator; and that the defendant Alexander Eaton, the father of the deceased and his statutory heir, executed a deed of an undivided one half thereof to the defendant George W. Kinsey, who accepted it with record notice of plaintiff's claim to the real property. The cause, being at issue, was tried, resulting in a decree as prayed for in the complaint, and the defendants appeal.

REVERSED.

For appellant there was an oral argument by *Mr. A. C. Woodcock*, with a brief over the names of *Moore & Gavin* and *Mr. Woodcock*, to this effect.

I. The entryman could not have alienated the land until he had received his final certificate: 19 Am. & Eng. Enc. Law, (1 ed.) 332.

II. The interest of the entryman was not devisable, not being completely acquired, and his heir took as a donee from the United States, not by inheritance: 20 Stat. U. S. 113, c. 190; *Hall v. Russell*, 101 U. S. 503; *Cooper v. Wilder*, 111 Cal. 191 (52 Am. St. Rep. 163, 43 Pac. 591).

III. The courts have jurisdiction to review the acts of the interior department on all legal questions: *Marquis v. Fisher*, 101 U. S. 473; *Quinley v. Conlon*, 104 U. S. 120; *Rector v. Gibbons*, 111 U. S. 276; *United States v. Murphy*, 32 Fed. 376; *United States v. Mann*, 32 Fed. 386; *Hosmer v. Wallace*, 47 Cal. 461.

For respondent there was an oral argument and a brief by *Mr. J. B. Hosford*, to this effect.

(1) A timber culture entry is subject to devise by law: *Bone v. Dickerson's Heirs*, 8 Land Dec. Dep. Int. 452; *Stark-*

weather v. Starkweather, 15 Land Dec. Dep. Int. 162; *Moore v. Phelps*, 16 Land Dec. Dep. Int. 151; *United States v. Dayton*, 26 Land Dec. Dep. Int. 690; *Cooper v. Wilder* (1st decision), 41 Pac. 26.

(2) Legal representatives under the acts of Congress relative to the disposition of public lands embrace representatives by contract as well as by operation of law: *Hogan v. Page*, 69 U. S. (2 Wall.) 605; *Morrison v. Jackson*, 92 U. S. 654; *Weeks v. Milwaukee, L. S. & W. Ry. Co.* 78 Wis. 501 (47 N. W. 737).

(3) The construction placed upon an act of Congress by the officers charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons: *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357 (10 Sup. Ct. 112); *Brown v. United States*, 113 U. S. 568 (5 Sup. Ct. 648); *Wilcox v. John*, 21 Colo. 367 (52 Am. St. Rep. 246, 40 Pac. 880).

(4) The rights of an entryman under the United States land laws are analogous to those of one in possession under a contract of purchase; and, except where the law otherwise directs the disposition of the right in case of the death of the entryman, the right passes to the devisee under a will: *Cardner v. Chicago, St. P. M. & O. Ry. Co.* 43 Minn. 375 (45 N. W. 713); *Red River & L. R. Co. v. Sture*, 32 Minn. 95 (20 N. W. 229); *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357 (10 Sup. Ct. 112); *United States v. Ball*, 31 Fed. 667; *United States v. Turner*, 54 Fed. 628; 1 Pomeroy, Eq. Jur. (2 ed.) § 105.

MR. CHIEF JUSTICE MOORE, after stating the facts in the foregoing terms, delivered the opinion of the court.

The question presented by this appeal is whether an entryman under the timber culture act of the United States, before receiving a final certificate, has a devisable interest in the land. The amendatory act of Congress approved

June 14, 1878 (20 Stat. U. S. 113, c. 190), prescribing the method of securing the title to public land under the timber culture act, so far as deemed material herein, is as follows:

"Section 1. That any person who * * has arrived at the age of twenty-one years, and is a citizen of the United States * * who shall plant, protect, and keep in a healthy, growing condition for eight years ten acres of timber, on any quarter-section of any of the public lands of the United States, or five acres on any legal subdivision of eighty acres, * * shall be entitled to a patent for the whole of * * such legal subdivision * * at the expiration of said eight years, on making proof of such fact by not less than two credible witnesses, and a full compliance of the further conditions as provided in section 2. * * "

"Sec. 2. That the person applying for the benefits of this act shall, upon application to the register of the land district in which he or she is about to make such entry, make an affidavit, before the register or the receiver * * . And upon filing said affidavit with said register and said receiver and on payment of \$10, if the tract applied for is more than eighty acres; and \$5.00 if it is eighty acres or less, he or she shall thereupon be permitted to enter the quantity of land specified. * * That no final certificate shall be given, or patent issued, for the land so entered until the expiration of eight years from the date of such entry; and, if, at the expiration of such time, or at any time within five years thereafter, the person making such entry, or, if he or she be dead, his or her heirs or legal representatives, shall prove by two credible witnesses that he or she or they have planted, and for not less than eight years, have cultivated and protected, such quantity and character of trees as aforesaid; that not less than twenty-seven hundred trees were planted on each acre and that at the time of making such proof that there

shall be then growing at least six hundred and seventy-five living and thrifty trees to each acre, they shall receive a patent for such tract of land."

In *Cooper v. Wilder*, 111 Cal. 191 (43 Pac. 491, 52 Am. St. Rep. 163), in construing the provision of the foregoing act, it was held that an entryman who died before making final proof had no devisable interest in the land, and that his heirs took the premises as donees of the United States, and not by inheritance from him. In deciding that case, Mr. Justice TEMPLE, speaking for the court, says: "Obviously the privilege or right acquired by the entry and filing is personal, and cannot be transferred except as authorized in the act. The death of the applicant before performance renders him incapable of performance, and that event would end the claim, but for the provisions of the act, which authorize the heirs to prove that he or they has or have performed. Does the heir in such case take by inheritance from the applicant, or is he, by appointment in the act itself, a substituted beneficiary of the government to whom the title goes by direct grant? It is admitted at once that the condition of the applicant prior to full performance is in nowise analogous to that of a preëemptor either before or after the preëemptor has received his certificate of purchase. The applicant has a right to the land, of which the government cannot deprive him, but which will be lost if he fails to perform. And death before performance renders such failure certain, and ends the estate of the applicant. In view, however, of the hardship of such a result, the law continues its offer to certain persons whom it is presumed the applicant himself might have selected. But they take, not by inheritance from the deceased, but as grantees from the government."

The making and filing the required affidavit and paying the necessary fee entitle the entryman, under the timber

culture act, to the possession of the land, which he holds by performing the conditions which the law imposes, and proof of his compliance with its provisions, within the time and according to the manner prescribed, give him a right to the issuance of a patent. Section 3 of the act under consideration provides "That if at any time after the filing of said affidavit, and prior to the issuing of the patent for said land, the claimant shall fail to comply with any of the requirements of this act, then and in that event such land shall be subject to entry under the homestead laws, or by some other person under the provisions of this act." The initiatory steps taken to secure a title to public land, under the timber culture act, do not constitute a grant *in præsenti* of the premises selected, but are equivalent to impelling the United States constantly to offer to the entryman a patent for the land, if he will fully comply with all the conditions required. His possession of the land, and the planting and cultivation of trees thereon, do not create an equity in his favor, analogous to a contract for the purchase of real property, that is measured by the value of the consideration partly performed; but his right is equivalent to a license that protects the improvements he may make, and guarantees to him a legal title to the premises, as a donation, if he will comply with the requirements which congress has prescribed. If he fail in this respect, his rights under the timber culture act are extinguished. His death renders the performance of the conditions impossible, thereby forfeiting all his rights, and, as his interest in the land terminates with his life, there is nothing upon which his devise of the premises can operate, nor any estate therein which his heirs can inherit. A generous government, however, desiring to donate the land thus partly improved to those to whom it would by law descend if the claimant had died intestate and seised of the premises, has wisely enacted, by its rep-

representatives in Congress, that, if the entryman die before fully complying with all the requirements specified in the timber culture act, "his or her heirs or legal representatives" may make the required proof, whereupon "they shall receive a patent for such tract of land." The phrase "legal representatives" in its ordinary acceptation means executors and administrators (*Cox v. Curwen*, 118 Mass. 198; *Grand Gulf R. Co. v. Bryan*, 8 Smedes & M. 234), though it may mean heirs, next of kin, or descendants: *Warnecke v. Lembca*, 71 Ill. 91 (12 Am. Rep. 85). To give to these words their ordinary meaning would seem to imply that upon the death of an entryman his executor or administrator, by making the necessary proof, should receive a patent for the land; but as it is altogether improbable that Congress intended that the title should vest in such representative, even in trust, the phrase so used in the act under consideration evidently means an heir, next of kin, or descendant. The homestead act provides that, upon the death of an entryman before fully complying with the conditions imposed, the right to complete the performance and receive a patent goes to his widow, or, in case of her death, to his heirs or devisees: Rev. Stat. U. S. § 2291 (U. S. Comp. St. 1901, p. 1390). Congress having used the word "devisees" in that act, and omitted it from the one under consideration, evidently discloses a purpose to prefer the heirs designated by the laws of a state, to the exclusion of devisees in the timber culture act. This substitution, in our opinion, makes the legal heirs of an entryman who dies before fully performing the conditions of the timber culture act donees of the United States, who take by purchase, and not by descent: *Cutting v. Cutting*, (C. C.) 6 Fed. 259.

Our attention has been called to decisions made by the Department of the Interior that would seem to lead to a different conclusion, but, as such decisions are not con-

clusive in the determination of questions of law, we think the better reason supports the opposite view, and therefore such decisions will not be followed.

The plaintiff's counsel cite in support of their theory, the case of *Church v. Adams*, 37 Or. 355 (61 Pac. 639), in which it was held that a claimant under the timber culture act, who had made an entry in good faith, was not inhibited from contracting, before final proof, to sell his claim. The decision in that case is based on the theory that the language of the act does not prohibit the making of such an agreement. If he performed the conditions which the law prescribed, and secured a patent for the land selected, a court of equity might enforce specific performance of his contract; but, as his interest in the premises is extinguished by his death before full performance, the government, in effect, re-enters, but thereafter permits his heirs, if they so desire, to initiate a new right independent of their ancestor, thus donating to them his improvements, and also commuting the time by deducting the period in which the entryman was lawfully in possession of the premises. In our opinion, there is nothing in the case relied upon that in any manner contravenes the principle here announced. Believing, as we do, that Eaton had no devisable "interest" in the land, it follows that the decree is reversed and the suit dismissed.

REVERSED.

Decided 18 June, 1904.

OLIVER v. OREGON SUGAR CO.

[76 Pac. 1086.]

COMPETENCY OF EVIDENCE UNDER THE PLEADINGS.

1. Evidence on disputed points is competent; for instance, under an issue as to the accuracy of certain scales at the time certain articles were weighed on them, it is competent to ask a witness if he knows the condition of the scales at the time of the weighing and what the condition was.

TESTIMONY ON AN ADMITTED MATTER HARMLESS.

2. Evidence merely tending to prove an admitted allegation, while not proper, is harmless.

APPEAL—BILL OF EXCEPTIONS—SHOWING OF ERROR.

8. Alleged errors cannot be considered unless the facts in relation thereto appear in the bill of exceptions: to illustrate, an objection to a deposition because it was not taken in accordance with the stipulation of the parties, is not available on appeal unless the points of difference appear in the record.

DEPOSITIONS—OBJECTIONS AVAILABLE AT TRIAL.

4. Objections to a deposition going only to the time or manner of taking it must be made by a motion to suppress, and will not be considered unless made before trial.

PRESUMPTION AS TO TIME OF MAKING OBJECTIONS.

5. Where it appears merely that an objection was offered and overruled there is a presumption that it was made at the trial, though the objection is one that might have been made by a preliminary motion.

DISPUTED FACTS ARE FOR THE JURY.

6. Plaintiff sold beets to defendant by the ton, the beets being weighed in car-load lots at defendant's factory on the railroad scales; and, a controversy arising as to the number of tons delivered, it was agreed, by way of settlement, that during the next season plaintiff should load specified cars in the same manner in which beets had been delivered before; that they should be weighed on corrected scales, and any difference in weight should be adjusted. *Held*, in an action for the price of beets delivered the first season, that it was a question for the jury whether a certain car furnished under the compromise agreement was intended by the parties to be used as a substitute for one of the cars specified in the agreement.

From Union: ROBERT EAKIN, Judge.

This is an action by E. W. Oliver against the Oregon Sugar Company. In the year 1899 the plaintiff and Turner Oliver, who has since assigned his interest to the plaintiff, sold and delivered to the defendant 33 car loads of beets at a stipulated price per ton, and this action is brought to recover a balance alleged to be due thereon. The beets were shipped in U. P. steel cars, O. S. L. cars, and O. R. & N. cars, and were weighed in car-load lots at defendant's factory, on the scales of the railway company. After they had been manufactured into sugar a controversy arose as to the number of tons actually delivered, it being alleged that the scales upon which the cars had been weighed were inaccurate. As a basis for the settlement of such controversy, the following written agreement was entered into between the parties:

"This Agreement made and entered into this 2d day of February, A. D. 1900, between the Oregon Sugar Company (incorporated) at La Grande, Oregon, party of the

first part, and E. W. Oliver and Turner Oliver, parties of the second part, Witnesseth that,

Whereas a dispute has arisen and exists between said parties as to the weights of all beets delivered by said second parties to said first party in car-load lots during the season of 1899, on account of the inaccuracy of the railroad scales at the sugar factory of said first party; and

Whereas said parties have been unable heretofore to agree upon a basis for the settlement of the differences between them; it is now

Hereby Mutually Agreed by and between the parties hereto, that said first party will procure for said second party during the beet delivering season of 1900 the following cars, which were used in shipping beets to the sugar factory during the season of 1899, to wit: U. P. all steel car No. 81767, O. S. L. car No. 3725 and O. R. & N. car No. 1140, which cars shall be loaded by said second parties during the campaign of 1900 in the same manner as said cars were loaded during the campaign of 1899, viz.—loaded full, with the sides built up with rows of beets and rounded off as full as the cars will hold, and with the same number of wagon loads as they were respectively loaded with during the campaign of 1899, and that the wagon loads of beets so used in loading said cars shall be weighed by said second parties before loading same on the cars, and said car loads of beets shall be weighed on corrected scales at La Grande, said wagon-load weights being used in checking up with said car-load weights in determining the accuracy of such weights, and it is mutually agreed that such verified car-load weights shall be used as a basis for estimating the weights of all car loads of beets delivered at said sugar factory by said second parties during the season of 1899, and that said second parties shall be paid by said first party for any shortage such verified weights shall show to exist on account of the factory weights made in 1899, at the prices called for by the contract under which said beets were delivered in 1899, and that said first party will pay interest on such deferred payments from the time such purchase price would have been due in 1899, to the time when such

payment shall have been made in the campaign in 1900, at the rate of ten per cent per annum."

At the time the test cars referred to in the agreement were needed in 1900, neither the U. P. nor the O. S. L. car specified could be secured, but by agreement of the parties two others were substituted for them, and used in their places. The O. R. & N. car, however, was in the yard at La Grande. It was not used, and there is a conflict in the testimony as to the reason therefor. The plaintiff says that when he and the superintendent of the defendant went into the yard to look for the cars named in the compromise agreement, they found the O. R. & N. car only; that it was loaded with beets, and standing on the railway track along with other cars; that he told the superintendent that it did not matter to him whether the defendant furnished the particular cars specified in the contract, and, if it would furnish others of the same capacity, it would answer the purpose. The defendant's testimony, on the other hand, is to the effect that plaintiff refused to accept the O. R. & N. car because it was too small. A day or two later the defendant sent from La Grande to Alicel one U. P. car and one O. S. L. car, which plaintiff contends he loaded in the same manner as the cars were loaded the previous year, but the defendant refused to accept them as test cars on the ground that they were not properly loaded. The plaintiff had a verdict and judgment in the court below, and the defendant appeals. The assignments of error relate to the ruling of the court in the admission of testimony and its instructions to the jury.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. John L. Rand* and *Mr. Leroy Lomax*.

For respondent there was a brief and an oral argument by *Mr. William M. Ramsey* and *Mr. Turner Oliver*.

MR. JUSTICE BEAN, after stating the facts in the foregoing terms, delivered the opinion of the court.

1. The questions of fact on the trial were whether the O. S. L. car sent by the defendant to the plaintiff in 1900 to be loaded with beets was intended by the parties to be used as a substitute for the O. R. & N. car specified in the agreement, and whether the test cars were loaded in the same manner as cars of the same class were loaded the previous year. The admission of Turner Oliver's testimony as to the condition of the scales upon which the cars loaded with beets were weighed during the season of 1899 is assigned as error. The plaintiff alleges that the scales "were so grossly inaccurate and out of order that the weights made thereon were of no use in determining how many tons of beets were actually contained in said 33 car loads so delivered or any of them." This averment is denied by the answer, and the evidence objected to was therefore within the issues. It was competent also for the purpose of showing that the difference in the weight of the cars loaded with beets in 1899 and of the test cars in 1900 was due to a defect and inaccuracy in the scales, and not, as defendant would seem to contend, to the manner in which they were loaded.

2. It is said that the inaccuracy of the scales is admitted by the compromise agreement of 1900, and therefore the proof objected to was immaterial. The pleadings of neither party seem to have been framed on this theory, but, even if true, the admission of the testimony was harmless error.

3. The second assignment of error relates to the overruling of defendant's objection to the reading of the deposition of one Toinby. The objection is that the deposition was not taken "in compliance with the stipulation for taking the same," but in what respect it differed from the

stipulation cannot be ascertained from the bill of exceptions. Neither the deposition, nor any portion thereof, is made a part of the record. The bill of exceptions contains nothing but the objection, a statement that it was overruled, and defendant's exceptions, together with what appears to be a copy of a stipulation that the deposition of the witness should be taken at any time previous to March 15, 1903, before Benjamin Pope, a notary public for the State of Illinois, residing at Duquoin, upon interrogatories and cross-interrogatories attached. There is nothing therefore in the bill of exceptions upon which to base the assignment of error.

4. Objections to the admission in evidence of a deposition on a ground going only to the time or manner of taking the same must be presented by a motion to suppress, and cannot be made for the first time at the trial: *Sugar Pine Lum. Co. v. Garrett*, 28 Or. 168 (42 Pac. 129); *Foster v. Henderson*, 29 Or. 210 (45 Pac. 899).

5. In the absence of a showing to the contrary, we must assume, in support of the ruling of the court below, that the objection in this case was of the character indicated.

6. The remaining assignments of error arise upon objections to instructions given, and are practically two—*first*, in submitting to the jury the question as to whether the O. S. L. test car furnished to the plaintiff by the defendant in 1900 in pursuance of the compromise agreement was intended by the parties to be used as a substitute for the O. R. & N. car specified in the agreement; and, *second*, in instructing the jury that if plaintiff loaded the test cars "substantially in the same manner and with substantially the same number of wagon loads as they were respectively loaded in 1899, viz., full, with the sides built up with rows of beets, and rounded off as full as the cars would hold," they should find for the plaintiff.

The ground for the first objection is that the instruc-

tion as given was outside the evidence. The entire testimony is attached to and made a part of the bill of exceptions; and, from the statement already made as to the evidence of the plaintiff and the defendant on this point, it is apparent that it was a disputed question, and therefore one properly for the jury. The plaintiff testifies that near the close of the beet season of 1900 he called at the factory of the defendant to see about the test cars, and that he and Mr. Stoddard, the defendant's superintendent, went out into the yard to look for them; that the O. R. & N. car was the only one they could find; that it was loaded with beets, and standing on the track with other cars similarly loaded; that he told Stoddard that it did not matter to him whether he received that particular car, and that, if he (Stoddard) could furnish other cars of the same capacity, it would be satisfactory; that he did not refuse to accept the car, and nothing was said at the time about its being small; that the next day Stoddard sent down, without any explanation, an O. S. L. car and a U. P. car to be loaded with beets, and they were so loaded; that the O. S. L. car was of about the same capacity as the O. R. & N. car named in the contract. This testimony is controverted in some respects by Stoddard, but it was sufficient to justify the court in submitting the question to the jury. The recital in the bill of exceptions that there was no evidence offered tending to show that there was any agreement between the plaintiff and the defendant that the test cars sent down should be used in lieu of the O. R. & N. car, other than the mere fact of sending them down, is, as defendant seeks to interpret it, a conclusion not warranted by the evidence. It was probably intended by the court as a statement that there was no evidence on that point other than that attached.

The other instruction complained of is within the rule announced on the former appeal of this case: 42 Or. 279

(70 Pac. 902). It was there said : "The controlling feature of the agreement is that the cars shall be loaded by the plaintiff in 1900 in substantially the same manner as they were loaded the previous year, in order that a fair, reasonable, and just basis may be obtained from which to ascertain the number of tons actually delivered in that year. This was the manifest object of the agreement, and it should be given such a construction as will accomplish the intention of the parties." This is not an action on the contract of 1900, and therefore the doctrine as to when a plaintiff may recover by proving substantial compliance with his contract has but little application. The action is for beets sold and delivered in 1899 under another contract. The agreement of February, 1900, was intended merely as a basis for settling a dispute as to the quantity of beets delivered. It provided, in effect, that the defendant should furnish plaintiff three cars during the beet season of 1900 — one each of the three classes of cars used in 1899; that plaintiff should load them in the same manner as they were loaded the previous year, and the weights thereof should be used as a basis for determining the dispute. The important question, then, was whether the cars loaded by the plaintiff in 1900 contained the same quantity of beets as similar cars loaded by him the previous year. The agreement says that they were to be loaded in the same manner and "with the same number of wagon loads," but contains no statement as to the size of a wagon load, or the quantity of beets which it contained. The mere loading with the same number of wagon loads, therefore, would furnish no satisfactory standard by which to determine whether the cars were loaded with the same quantity of beets. The question was not so much as to the number of wagon loads put upon the cars in 1900, as it was whether the cars, after they were loaded, contained substantially the same quantity of beets as the cars loaded

in 1899, and that question was, we think, fairly and clearly submitted to the jury.

It follows that the judgment of the court below must be affirmed, and it is so ordered. AFFIRMED.

Argued 10 March, decided 28 March, 1904.

EX PARTE STACEY.

[75 Pac. 1060.]

HABEAS CORPUS—SCOPE OF INQUIRY.

1. In a habeas corpus proceeding to inquire into the cause of an imprisonment the only question that can be considered is whether the proceedings under which the petitioner is held are absolutely void, and unless they are so, the writ must be denied.

HABEAS CORPUS—PRESUMPTION OF REGULARITY.

2. The return to a writ of habeas corpus being traversable in this State, it is presumed, in the absence of a showing to the contrary, that all legal proceedings therein referred to were regular.

HABEAS CORPUS—SUFFICIENCY OF INFORMATION AFTER TRIAL.

3. The sufficiency of the charge on which a prisoner was tried cannot be inquired into on habeas corpus, since that matter was properly determinable by the trial court, and its decision can be reviewed only by appeal.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Habeas corpus to inquire into the cause of the imprisonment of Bert Stacey. The prisoner was remanded and appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. P. C. Dormitzer*.

For respondent there was a brief over the names of *Andrew M. Crawford*, Attorney-General, *John Manning*, District Attorney, and *Arthur C. Spencer*, with an oral argument by *Mr. Crawford*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is a special proceeding to inquire into the cause of the imprisonment of Bert Stacey. A writ of habeas corpus having been issued and directed to W. A. Storey, as Sheriff of Multnomah County, he, as a return thereto, cer-

tified that Stacey had been convicted in the circuit court of that county of the crime of robbery, and, having been sentenced to imprisonment in the penitentiary for the term of two years, was committed to his custody, to be taken to the place of incarceration, setting out a copy of the judgment in pursuance of which he held the prisoner, whom he also produced. The return not having been controverted in any manner, the court proceeded to examine into the facts stated therein, and, having concluded that the restraint was legal, remanded the prisoner, from which judgment he appeals.

It is contended by his counsel that the information under which he was convicted is fatally defective, and, this being so, the court erred in not discharging him from custody. The bill of exceptions does not contain a transcript of the information, but respondent's brief sets out what purports to be a copy thereof, as follows:

Bert Stacey is accused by the District Attorney of the Fourth Judicial District of the State of Oregon, for the County of Multnomah, by this information, of the crime of robbery, committed as follows: The said Bert Stacey on the 24th day of December, A. D. 1902, in the County of Multnomah and State of Oregon, then and there being, did then and there unlawfully and feloniously take, steal, and carry away a certain watch, of the value of \$40, of the personal property of one H. F. Copland, from the person of said H. F. Copland, and against his will, by violence to his person, and by assault then and there made by him, the said Bert Stacey, upon the said H. F. Copland, and by putting him, the said H. F. Copland, in fear of some immediate injury to his person, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

This information is based on a violation of the following provision of the statute: "If any person, not being armed with a dangerous weapon, shall by force and violence, or by assault, or by putting in fear of force and violence or

assault, rob, steal, or take from the person of another any money or other property which may be the subject of larceny, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than five years": B. & C. Comp. § 1769. It is argued by appellant's counsel that the element of force prescribed by the statute is omitted from the information, which charges violence and fear of violence, and, as the accusation must be direct and certain, as it regards the particular circumstances of the crime charged, when they are necessary to constitute a complete crime (B. & C. Comp. § 1306), the theft of the watch could only have been accomplished either by violence, "or" by fear of violence, but the averment that it was taken by violence "and" by fear of violence contravenes the express provision of the statute, and that the particular circumstances of the crime charged are so repugnant as to render the information fatally defective.

1. Whether the point insisted upon would be sufficient on appeal to reverse the judgment, it is not necessary to inquire, but on a writ of habeas corpus the only question to be considered is whether or not the judgment, or the commitment issued thereunder, is void: *Ex parte Tice*, 32 Or. 179 (49 Pac. 1038). In *Barton v. Saunders*, 16 Or. 51 (16 Pac. 921, 8 Am. St. Rep. 261), Mr. Chief Justice LORD, discussing this subject, says: "Errors or irregularities which render proceedings voidable merely the writ of habeas corpus cannot reach, but only such defects in substance as render the process or judgment absolutely void." In *Ex parte Watkins*, 28 U. S. (3 Pet.) 193, Mr. Chief Justice MARSHALL says: "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous."

2. The circuit courts of this State have exclusive original jurisdiction of all felonies committed therein: Const. Or. Art. VII, § 9; *State v. Gardner*, 33 Or. 151 (54 Pac. 809). The bill of exceptions does not disclose that Stacey interposed a plea of not guilty to the information, but, as the return to a writ of habeas corpus is traversable in this State (B. & C. Comp. § 640), if such plea was not entered it was his duty to show that fact, and, not having done so, it will be presumed that the court had jurisdiction of his person: *Ex parte Howe*, 26 Or. 181 (37 Pac. 536).

3. In *Ex parte Harlan*, 1 Okl. 48 (27 Pac. 920), it was held that, where the trial court acquired jurisdiction of the subject-matter of an indictment and the person of the accused, the judgment of the court on the question whether the indictment sufficiently charged the crime of perjury can only be reviewed on appeal or writ of error, and habeas corpus will not lie. In deciding the case, Mr. Chief Justice GREEN, speaking for the court, says: "As the trial court had jurisdiction of the subject-matter of the indictment and of the person of the petitioner, it was a question of law for that court to determine whether or not the facts averred in the indictment constituted the crime of perjury; and, if the trial court erred in its judgment upon that question, such error can only be corrected by appeal, or writ of error, in this court, and not by writ of habeas corpus." The question whether the facts averred in the information render it vulnerable to a demurrer cannot be considered except on appeal, and, if any error was committed in this respect, the judgment was only voidable, and not void, and, this being so, habeas corpus will not lie to correct it. It follows that the judgment must be affirmed, and it is so ordered.

AFFIRMED.

Decided 1 March, 1904.

DOWELL v. BOLT.

[75 Pac. 714.]

APPEAL—NECESSITY OF FILING NOTICE.

1. Under the terms of B. & C. Comp. § 549, Subds. 1 and 2, providing for the giving and filing of a notice of appeal and an undertaking, the serving and filing of the notice is the necessary jurisdictional step, without which the appellate court cannot proceed.

APPEAL—SERVING UNDERTAKING—MISTAKE.

2. Where a party is unintentionally in default in the performance of any act necessary to perfect an appeal to the supreme court initiated in good faith, except the serving and filing of the notice of appeal, the appellate tribunal may, in its discretion, permit the subsequent performance of such act, under the terms of B. & C. Comp. § 549, subd. 4, regardless of whether the omission was due to a mistake of law or of fact.

From Josephine: **HIERO K. HANNA**, Judge.

This is a motion to dismiss an appeal.* The facts appear
in the opinion. **DENIED.**

Mr. W. C. Hale for the motion.

No appearance *contra*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is a motion to dismiss an appeal. The defendant John Bolt, with the assent of the plaintiff, W. I. Dowell, executed to him a confession of judgment for the sum of \$260 and costs, which, in vacation, was entered in the journal of the circuit court for Josephine County, and, an execution having been issued thereon, certain placer mining claims in that county belonging to Bolt were sold to Dowell. H. C. Austin thereafter commenced an action against Bolt in that court, and, having secured a judgment therein for the sum of \$164.93, attorney's fees, costs, and disbursements, and an order for the sale of these mining claims which had been attached in that action, moved to set aside the confession of judgment, on the ground that it did not state facts out of which the indebt-

*NOTE.—This appeal was afterward dismissed for failure to pay the trial fee.
REPORTER.

edness arose. This motion was denied, and the sale made to Dowell of the mining claims confirmed, which judgment Austin sought to review by serving and filing a notice of appeal October 27, 1903, and ten days thereafter filing an undertaking on appeal, which was not served on Dowell or his attorney, who moved to dismiss the appeal for that reason. Notice of such motion having been served, Austin's attorney filed an affidavit to the effect that the failure to serve the undertaking was due to inadvertence and oversight, and the omission to comply with the statutory requirement was not called to his attention until after plaintiff's brief had been filed in this court; and, based on such written declaration under oath, he moved for leave to serve a copy of the undertaking, and to attach it to the transcript as a part thereof, and an amendment to the bill of exceptions.

1. It is contended by plaintiff's counsel that the service of an undertaking is a condition precedent to the exercise of the right of appeal, and, being jurisdictional, the motion to dismiss the appeal should be allowed: The statute prescribing the mode of taking and perfecting an appeal, so far as deemed material, is as follows: "2. Within ten days from the giving of notice or service of notice of the appeal, the appellant shall cause to be served on the adverse party or his attorney an undertaking, as hereinafter provided, and within said ten days shall file the original of said undertaking, with proof of service indorsed thereon, with said clerk. Within five days after service of said undertaking, the adverse party or his attorney shall except to the sufficiency of the sureties in the undertaking, or he shall be deemed to have waived his right thereto." * * "4. From the expiration of the time allowed to except to the sureties in the undertaking, or from the justification thereof if excepted to, the appeal shall be deemed perfected. When a party in good faith gives due notice

as hereinabove provided of an appeal from a judgment, order, or decree, and thereafter omits, through mistake, to do any other act (including the filing of an undertaking as provided in this section) necessary to perfect the appeal or to stay proceedings, the court or judge thereof, or the appellate court, may permit an amendment or performance of such act on such terms as may be just": B. & C. Comp. § 549. It is the giving of a notice in open court at the time the judgment, decree, or order is made, and the entering thereof in the journal by order of the court or judge, or the serving and filing of a notice of appeal within the time and according to the manner prescribed, that confers jurisdiction on the appellate court, and constitutes the taking of an appeal, the strict performance of which cannot be waived by the parties, nor excused by the court: *Oliver v. Harvey*, 5 Or. 360; *Taylor v. Lapham*, 41 Or. 479 (69 Pac. 439).

2. The giving of an undertaking, however, is one of the steps required to perfect an appeal; and, under the liberal provisions of the statute quoted, the appellate court may permit the performance of such act when it appears that the notice of appeal has been given in good faith, and that the failure to comply with the requirements of the statute is occasioned by mistake. The affidavit of defendant's counsel does not state what constituted the inadvertence and oversight causing the omission to serve the undertaking, and it may have been either a mistake of law or of fact. As we view the statute, however, the character of the mistake is immaterial, so long as it in fact existed, and this is to be determined by the good or bad faith with which the notice of appeal is given or served: *Skinner's Will*, 40 Or. 571 (62 Pac. 523). In the case at bar the appellant caused a bill of exceptions to be filed in this court and also prepared and filed a brief, thereby evidencing the good faith of the giving of due notice of appeal;

and believing, as we do, from the affidavit of defendant's counsel, that the mistake existed, and that the appellant attempted to correct it as soon as discovered (*Newberg Orchard Assoc. v. Osborn*, 39 Or. 370, 65 Pac. 81), the motion to dismiss the appeal should be denied and the defendant's motions allowed, and it is so ordered.

MOTION OVERRULED.

Argued 30 March, decided 16 May, 1904.

SCHROEDER v. MULTNOMAH COUNTY.

[76 Pac. 772.]

LIABILITY OF COUNTY FOR INJURY FROM DEFECT IN HIGHWAY.

1. Unless made so by statute, a county is not liable for injuries resulting from defects in public highways, even though it is required to keep the highway in repair and is given power to provide money for that purpose.

STATUTORY LIABILITY OF COUNTY FOR DEFECTIVE HIGHWAY.

2. The legislative act imposing upon counties a liability for injuries received by reason of defective public roads or bridges (Laws 1903, pp. 262, 280, § 59,) applies only to legal county roads.

CITY BRIDGE NOT A LEGAL COUNTY ROAD.

3. The streets of a city, in which term is included bridges connecting streets, are not included in the expression "a legal county road," used in the statute imposing a liability on counties for injuries resulting from defects in such roads (Laws 1893, p. 141, § 1, now Section 4781, B. & C. Comp.), even though the duty of caring for such streets or bridges may have been placed upon the county.

From Multnomah: JOHN B. CLELAND, Judge.

Action of damages by Catherine Schroeder against Multnomah County for injuries received by her through the breaking of the footway on the Morrison-street Bridge in Portland. A demurrer to the complaint was sustained and plaintiff appeals.

AFFIRMED.

For appellant there was an oral argument by *Mr. Thomas O'Day* and *Mr. Otto J. Kraemer*, with a brief over the names of *Charles J. Schnabel*, *Victor K. Strode*, *Wilson T. Hume*, *Thomas O'Day*, *Schuyler C. Spencer*, *Walter G. Hayes*, *Otto J. Kraemer*, *Daniel J. Malarkey*, *William M. Davis*, and *Mark O'Neil* to this effect.

I. If a bridge over the Willamette River in Portland is under the exclusive management, control, and supervision of Multnomah County, and used by it as a thoroughfare for street cars, teams, wagons, foot passengers, and general highway purposes, it is a highway of the State and a legal county road: *Follmer v. Nuckolls County*, 6 Neb. 210; *Pittsburg & W. E. Pass. Ry. Co. v. Point Bridge Co.* 165 Pa. 37, 43 (26 L. R. A. 323, 30 Atl. 511); *Larue v. Oil City St. Pass. Ry. Co.* 170 Pa. 249 (32 Atl. 977); *Burridge v. City of Detroit*, 117 Mich. 557 (72 Am. St. Rep. 582, 42 L. R. A. 648, 76 N. W. 84); *City of Chicago v. Powers*, 42 Ill. 169 (89 Am. Dec. 418); *City of Goshen v. Myers*, 119 Ind. 196 (2 N. E. 657); *City of Eudora v. Miller*, 30 Kan. 494; *Jones v. Keith*, 37 Tex. 394 (14 Am. Rep. 382); *Commonwealth v. Central Bridge Corp.* 66 Mass. (12 Cush.) 242, 244; *Simon v. Northup*, 27 Or. 487 (30 L. R. A. 171, 40 Pac. 560); *Brand v. Multnomah County*, 38 Or. 79, 97 (84 Am. St. Rep. 772, 50 L. R. A. 389, 60 Pac. 390, 62 Pac. 209); Elliott, Roads and Sts. § 28.

II. Even though joined at each end by a street of the City of Portland, it is nevertheless a county road: *Bell v. Foutch*, 21 Iowa, 119; *Skinner v. Henderson*, 26 Fla. 121 (8 L. R. A. 55, 7 So. 464).

III. The county is liable under the statute for injuries received on defective roads: Laws 1903, pp. 262, 280, § 59.

IV. A county under the circumstances stated in the complaint would be liable in damages at common law without such a statute as the one cited: *House v. Board of Comrs.* 60 Ind. 580 (28 Am. Rep. 657); *State, ex rel. v. Board of Comrs.* 80 Ind. 478 (41 Am. Rep. 821); *Board of Comrs. v. Pritchett*, 85 Ind. 68; *Vaught v. Board of Comrs.* 101 Ind. 123; *Board of Comrs. v. Rickel*, 106 Ind. 501 (7 N. E. 220); *Board of Comrs. v. Montgomery*, 109 Ind. 69 (9 N. E. 590); *City of Goshen v. Myers*, 119 Ind. 196 (21 N. E. 657); *Board of Comrs. v. Blair*, 8 Ind. App. 574; *County Comrs.*

v. *Duckett*, 20 Md. 468 (83 Am. Dec. 557); *County Comrs. v. Gibson*, 36 Md. 235; *County Comrs. v. Baker*, 44 Md. 1; *Eyler v. County Comrs.* 49 Md. 257 (33 Am. Rep. 249); *County Comrs. v. Burgess*, 61 Md. 29 (48 Am. Rep. 88); *Kennedy v. County Comrs.* 69 Md. 65 (14 Atl. 524); *Brown v. Jefferson County*, 16 Iowa, 339; *Krause v. Davis County*, 44 Iowa, 141; *Ferguson v. Davis County*, 57 Iowa, 601 (10 N. W. 906); *Huff v. Poweshiek County*, 60 Iowa, 529 (15 N. W. 418); *Roby v. Appanoose County*, 63 Iowa, 113 (18 N. W. 711); *Cooper v. Mills County*, 69 Iowa, 350 (28 N. W. 633); *Weirs v. Jones County*, 80 Iowa, 151 (20 Am. St. Rep. 411, 45 N. W. 883); *Humphreys v. Armstrong County*, 56 Pa. 204; *Shadler v. Blair County*, 136 Pa. 488 (20 Atl. 539).

V. A county voluntarily performing a certain act occupies the same attitude as a private corporation in respect to an action for damages, and it makes no difference in point of principle whether a special duty is imposed with its consent, express or implied, or whether it voluntarily assumed the performance of that which, if imposed by the legislature, becomes a special duty: *Hannon v. County of St. Louis*, 66 Mo. 313.

For respondent there was an oral argument by *Mr. Chas. H. Carey*, with a brief over the names of *John Manning*, District Attorney, and *Carey & Mays*, to this effect.

(1) The Morrison-street Bridge is in a certain sense a public highway, but is not, nor is Morrison Street, a "legal county road" within the meaning of the statute: Laws 1903, pp. 262, 280, § 59; Laws 1893, p. 141 (2 B. & C. Comp. § 4781).

(2) The special act under which the City of Portland acquired the bridge imposes the duty on the county to maintain and repair, but does not create a county road, (which could not be done under the constitution by special act,) or provide a remedy in case of failure to repair:

Laws 1891, p. 633; Laws 1893, p. 799; Laws 1895, p. 421.

(3) The duty to repair is not by reason of the general duty to repair a bridge in a county road, but by the special act, which is unconstitutional if it relates to a county road or the general highway system of the State: 1 B. & C. Comp. § 912; *Simon v. Northup*, 27 Or. 498 (30 L. R. A. 171, 40 Pac. 560).

(4) Morrison and East Morrison streets in the City of Portland are not county roads, and the bridge is not a county road: Elliott, Roads and Sts., p. 313; *Heiple v. East Portland*, 13 Or. 97 (8 Pac. 90); *East Portland v. Multnomah County*, 6 Or. 62.

MR. JUSTICE BEAN delivered the opinion of the court.

This is an action against Multnomah County to recover damages for an injury received by the plaintiff on account of a defect in Morrison-street Bridge, alleged to have been due to the negligence of the defendant county, its officers and agents. Morrison-street Bridge spans the Willamette River in the City of Portland, and connects the streets on either side, making them a continuous public highway. The bridge was originally built and operated by a private corporation as a toll bridge, but in 1895 the legislature passed an act "to authorize the City of Portland" to acquire it by purchase or condemnation, a committee being designated to make the purchase, and authorized to issue and dispose of the bonds of the city for that purpose: Laws 1895, p. 421. The act provided that, after the bridge was thus acquired, the committee should turn it over to the county court of Multnomah County, which should take charge of, manage, and operate it as a free bridge, being given power and authority to employ such agents and servants as it might deem necessary, and to make all needful rules and regulations for the conduct, management, and use of the bridge by the city, its inhab-

itants, and the public in general. It was also required to levy and collect an annual tax upon all the taxable property within the county, sufficient to provide a fund with which to maintain and keep the bridge in good condition and repair during the ensuing year. After the organization of the bridge committee, it issued bonds as provided, with the proceeds of which it purchased the bridge for and in the name of the city, turning the management and control thereof over to the county court of Multnomah County, which has ever since operated and maintained the same as a free bridge and public highway. The single question on this appeal is whether, under these circumstances, the county is liable for an injury resulting from a defect in the bridge, due to the negligence of its officers and agents.

1. It must, we think, be accepted as settled law that, unless made so by statute, a county is not liable for an injury resulting from a defect in a public road or highway, notwithstanding the law may require it to keep such road or highway in repair, and give it ample power to provide means with which to discharge the obligation. Such was the decision in *Templeton v. Linn County*, 22 Or. 313 (29 Pac. 795, 15 L. R. A. 730), and, notwithstanding the argument of counsel, ably restating the grounds upon which it was sought to maintain that action, we are not disposed to overrule the decision. Unless there is some statute, therefore, making Multnomah County liable for negligence in the operation or maintenance of Morrison-street Bridge, the plaintiff cannot recover.

2. The only statute having any bearing upon the question is section 59, p. 280, Act 1903, which provides: "When any individual, while lawfully traveling upon any highway of this State or bridge upon such highway, the same being a legal county road, shall, without contributory negligence on his part, and without knowledge upon his part of the defect or danger, sustain any loss, damage, or injury, in

consequence of the defective and dangerous character of such highway or bridge, either to his person or property, he shall be entitled to recover of the county in which such loss, damage, or injury occurred, compensatory damages, not to exceed the sum of \$2,000 in any case, by an action in the circuit court of such county, or in a justice's court therein, if the amount of damages sued for shall not exceed the sum of \$250": Laws 1903, pp. 262, 280, § 59. This is practically a reënactment of the act of 1893, passed soon after the decision in the Templeton Case (Laws 1893, p. 141, § 1),* and which was intended to give a remedy where none existed before. It imposed a new liability upon a county, and must therefore be strictly construed: *McFerren v. Umatilla County*, 27 Or. 311 (40 Pac. 1013). By its terms, the right to the remedy is confined to one injured while lawfully traveling upon a highway of this State, or bridge upon such highway, "the same being a legal county road." It is apparent from the language used that the legislature only intended to provide a remedy for an injury received by a traveler on a county road or highway.

3. It is unnecessary to consider at this time what kind of a highway will be deemed "a legal county road" within the meaning of the statute, since by no possible construction can the term be held to include a city street or bridge. Morrison-street Bridge, upon which plaintiff was traveling at the time of her injury, is and was the property of, and one of the highways of, the City of Portland, and in no sense a county road or highway. That question was practically determined in *Simon v. Northup*, 27 Or. 487 (40 Pac. 560, 30 L. R. A. 171), which was a mandamus proceeding to compel the county to take over the management and control of the bridge now in question. The constitutionality of the act was challenged by the county on the

* Now Section 4781, B. & C. Comp.—REPORTER.

ground that it was a special act to provide for "working on highways," and therefore in conflict with article IV, § 23, subd. 7, of the constitution, but the court held that Morrison-street Bridge was not a highway within the meaning of the constitution, which was intended to apply to such roads and highways as are a part of the general highway system of the State and can be maintained and repaired under the general law, and not to the public bridges and ferries of a city. The opinion proceeded all the way through upon the theory that the bridge in question was the property and one of the highways of the city, and that the act of the legislature simply transferred its supervision and control from the city to the county, without constituting it the property of the county or a county road or highway. The transfer of the control and supervision of the bridge from the city to the county was merely to provide for its convenient operation and maintenance. The act of the legislature making such transfer defines the rights, powers, duties, and liabilities of the county, and, as the legislature has not imposed upon it a liability for negligence, the courts cannot do so under the general act making a county liable for an injury resulting from a defect in a "legal county road," even though the county may be charged by law with the duty of keeping the bridge in repair, and be given power to provide a fund for that purpose. The question as to whether the county should be liable for negligence in the performance of the duty imposed upon it is a legislative, not a judicial one, and, until the legislature sees proper to make it liable by statute, no action can be maintained against the county therefor.

It follows that the demurrer was properly sustained, and the judgment of the court below will be affirmed.

AFFIRMED.

Decided 13 June, 1904.

McDOWELL v. PARRY.

[76 Pac. 1081.]

45	99
d48	474
48	475

CONSTRUCTION OF ATTACHMENT STATUTES — NAMES OF PARTIES.

1. Attachment proceedings are strictly construed and must be exactly complied with. Under this rule the names of the parties to an action must be stated with precise correctness in the certificate of attachment required by Section 301, B. & C. Comp.

DEFECTIVE CERTIFICATE OF ATTACHMENT.

2. Under B. & C. Comp. § 301, providing that in attaching real property the sheriff shall make and file a certificate containing the names of the parties, etc., a certificate giving the name of a party as "A. W. K." when in reality his name was "W. A. K." is fatally defective, even though in the body of the document the name was correctly stated.

ALTERED RETURN — EVIDENCE TO CONTRADICT.

3. A certificate of attachment appearing to have been changed by having written on it different initials in pencil above some of those originally written, is *prima facie* correct as first prepared, and very strong evidence will be required to show that the alteration was made before filing.

From Baker: ROBERT EAKIN, Judge.

Suit by Lillian H. McDowell against Frank S. Parry for an injunction. The facts are stated in the opinion. Defendant appeals from a decree against him.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Chas. A. Johns*.

For respondent there was a brief over the names of *Olmsted & Strayer*, with an oral argument by *Mr. W. H. Strayer*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is an appeal by the defendants from a decree enjoining the sale of real property. The transcript shows that Margaret E. Kersting, with her own money, purchased six lots in Baker City, Oregon, but the deed therefor was inadvertently executed to her husband, W. A. Kersting, against whom the defendant Frank S. Parry thereafter secured a judgment in the superior court for Los Angeles County, California, in which he is designated

as A. W. Kersting. Three of these lots were conveyed to her May 9, 1900, the parties to the instrument intending to include all of them in the description. Parry commenced an action in the circuit court for Baker County, Oregon, against W. A. Kersting, to recover on his judgment, alleging in the complaint that A. W. and W. A. Kersting were identical; and, a writ of attachment having been issued, A. H. Huntington, the then sheriff of that county, on August 11, 1900, filed in the office of the county clerk a certificate entitled as follows:

“In the Circuit Court of the State of Oregon for the
County of Baker.

Frank S. Parry, Plaintiff,

vs.

A. W. Kersting, Defendant,”

—and to the effect that the six lots had been attached at the suit of the plaintiff “in the above entitled action, in which Frank S. Parry is plaintiff, and W. A. Kersting is defendant.” Kersting and his wife, five days thereafter, executed a deed of all the lots to George H. Walker, who conveyed them to the plaintiff, she having no knowledge of the attachment, and such notice thereof only as the certificate afforded. In the action instituted in Baker County, judgment was rendered against Kersting for the sum demanded, the court ordering the lots attached to be sold in satisfaction thereof. An execution was issued on this judgment, and the defendant H. K. Brown, as sheriff, in pursuance thereof, levied on the six lots, and advertised them for sale, whereupon this suit was commenced, resulting in a decree as hereinbefore stated. It will be remembered that on August 11, 1900, when the certificate of attachment was filed, Kersting held the legal title to three of the lots, and the question to be considered is whether or not the misnomer adverted to failed to create

a lien on the latter premises as against an innocent purchaser thereof.

1. The statute prescribing the manner of creating such a lien is as follows: "Real property shall be attached as follows: The sheriff shall make a certificate containing the title of the cause, the names of the parties to the action, a description of such real property, and a statement that the same has been attached at the suit of the plaintiff; and deliver the same to the county clerk of the county in which the attached real estate is situated": B. & C. Comp. § 301. In the complaint, summons, affidavit for an attachment, undertaking therefor, and writ thereof, W. A. Kersting is properly designated as a party, but in the title in the certificate of attachment, his initials are transposed, though in the body of the certificate they are correctly given. "Attachment proceedings," says Mr. Justice THAYER in *Schneider v. Sears*, 13 Or. 69 (8 Pac. 841), "are statutory, and, unless the statute is strictly pursued, no right is acquired under them." The object to be attained by the filing of a certificate of attachment is to afford notice to intending purchasers that real property affected thereby has been subjected to a lien for the payment of such a sum of money as may be recovered in an action therefor: B. & C. Comp. § 303. It will be remembered that real property is attached by filing a certificate containing, *inter alia*, the names of the parties to the action. "The title of the cause," as used in Section 301, B. & C. Comp., is not so comprehensive as the designation thereof in Section 67, B. & C. Comp., where the phrase includes the names of the parties also. Mr. Bliss, in his work on Code Pleading, (3 ed.) § 145, in discussing the statutory requirements of a complaint, says, under the caption, "The Title, Which Contains the Name," "The full names of both plaintiffs and defendants should be given as plaintiffs and as defendants—not, as at common law and

in equity, by describing them in the body of the pleading, but in the form of a title to the cause—and they may be afterward referred to, without naming them, as ‘the plaintiff’ or ‘the defendant.’” The statute regulating the manner of attaching real property, having prescribed that the sheriff’s certificate shall contain (1) the title of the cause; (2) the names of the parties to the action, etc.—might seem to imply that a distinction in the term, “the title of the cause,” as applied to a complaint, and when referring to a certificate of attachment, was intended, so that if the names of the parties were correctly stated in the body of the certificate, as in the case at bar, it would be a sufficient compliance with the law’s demands. We think, however, that the legislative assembly, out of an abundance of caution, in attempting to protect the rights of innocent persons, required a statement of the names of the parties in the certificate of attachment as a part of the title of the cause, as prescribed in Section 67, B. & C. Comp.

2. The county clerk being required to record such certificate when filed, an intending purchaser of real property, in searching the records for attachments, would not be expected to examine the files of all cases, to ascertain if the property which he desired to purchase was encumbered with a lien; but, no provision having been made for indexing certificates of attachment in lieu thereof, the correct name of the attachment debtor must necessarily be stated therein as a part of the title of the action. It would be a travesty on judicial procedure to assume that the attachment debtor’s name might be given as John Doe in the title to the action in the certificate of attachment, and correctly stated in the body thereof. Notice, to be effectual, must be in the nature of a signal of warning, the observance of which instantaneously attracts the attention of those who are interested therein or would be affected thereby, and which, if prosecuted with reasonable dili-

gence, would lead to the knowledge which it is designed to impart. Based upon this rule, the name of A. W. Kersting, as recorded in the book of attachments, could afford no notice that it was intended to affect the real property of W. A. Kersting. Thus, in *Dutton v. Simmons*, 65 Me. 583 (20 Am. Rep. 729), it was held that the certificate of an officer to the register of deeds of an attachment of the real estate of Henry M. Hawkins, when the name of the defendant in the writ was Henry F. Hawkins, was such a misdescription of the person sued as to render the attachment void.

3. The testimony shows that the certificate of attachment was prepared with a typewriter, and over the initials "A. W." in Kersting's name there are written with a lead pencil the letters "W. A." and it is insisted by defendants' counsel that this alteration was made before the certificate was filed, thereby creating a lien on the premises, and that an error was committed in enjoining the sale of the property. It does not appear when this change was made, except inferentially, and, as it is not conclusively shown that it was altered before filing the certificate, no error was committed as alleged.

It follows from these considerations that the decree is affirmed.

AFFIRMED.

Decided 13 June, 1904.

PACIFIC LIVESTOCK COMPANY v. MURRAY.

[76 Pac. 1079.]

TRESPASS BY SHEEP ON UNFENCED LAND*—DAMAGES.

1. Under the act of 1872 (Laws 1872, p. 123), providing that no action shall be maintained in specified counties of Oregon for injury done by certain enumer-

*See note in 81 Am. St. Rep. 446, Liability of Owners of Stock Herded or Permitted to Range on the Lands of Another, Though They are not Protected by a Lawful or any Fence.

See, also, notes: Damage by Trespassing Animals, Common-Law Rule, 4 L. R. A. 840; Liability of Owner for Trespass of Cattle, 22 L. R. A. 55; and briefs in *May v. Poindexter*, 47 L. R. A. 588.

As to sufficiency of fences to exclude or restrain cattle, see note in 22 L. R. A. 106.—REPORTER.

ated kinds of animals, not including sheep, unless the person injured shall allege and prove that the premises were inclosed with a lawful fence at the time of the alleged injury, the owner of sheep that trespass on unfenced land in the specified counties is liable for the injury so caused, the common law being there in force.

OPINION EVIDENCE OF AMOUNT OF DAMAGE.

2. Opinions as to the amount of damage suffered through a tort are not competent, the jury being the exclusive arbiters of that question.

MEASURE OF DAMAGES FOR DESTROYING GRASS.

3. The measure of damages caused by a trespass on grazing land is the reasonable value to the plaintiff of the destroyed verdure, and the value of the injury to the freehold.

TRESPASS—EVIDENCE OF INJURY BY OTHER TRESPASSERS.

4. In an action for damages caused by a trespass on grazing land, the defendant may show that others were intruding on the same property at the same time, and inflicted part of the injury complained of.

From Grant: MORTON D. CLIFFORD, Judge.

Action by the Pacific Livestock Company against Kenneth Murray for damages caused by defendant's sheep on plaintiff's unfenced land. Plaintiff had judgment and defendant appeals. The case was submitted on briefs under the proviso of rule 16 of the supreme court: 35 Or. 587, 600. REVERSED.

For appellant there was a brief over the name of *Hicks & Davis* to this effect.

I. The common-law rule as to trespass ought not to be held applicable to the sparsely settled regions of this country. It is to the public interest to condone unintentional trespasses: *Powers v. Kindt*, 13 Kan. 74; *Wingrove v. Williams*, 6 Kan. App. 262 (51 Pac. 52); *Willard v. Mathesus*, 7 Colo. 76 (1 Pac. 690); *Monroe v. Cannon*, 24 Mont. 316 (61 Pac. 863, 81 Am. St. Rep. 436, with note); *Cosgriff v. Miller*, 10 Wyo. 190 (68 Pac. 206, 98 Am. St. Rep. 977); *Harrison v. Adamson*, 76 Iowa, 337 (41 N. W. 34); *Lazarus v. Phelps*, 152 U. S. 81 (14 Sup. Ct. 477).

II. The complaint is fatally defective in that it does not show that the land trespassed upon was inclosed by a lawful fence. This is true of all parts of the State except those expressly excepted by statute: B. & C. Comp. §§ 4334–4340; *Campbell v. Bridwell*, 5 Or. 311; *Walker v. Bloom-*

ingcamp, 34 Or. 391 (43 Pac. 175, 56 Pac. 809); *Fry v. Hubner*, 35 Or. 184 (57 Pac. 420).

III. The measure of damages is the usable value of the land for so many sheep as may have pastured on it during the time complained of: *Sutherland, Damages*, (2 ed.) §§ 1016, 1017.

IV. As it appeared that other persons were grazing cattle on these lands during this time it devolved upon plaintiff to show what proportion of the damage was done by defendant's sheep: *Dooley v. Seventeen Thousand Five Hundred Head of Sheep*, (Cal.) 35 Pac. 1011.

V. Damages cannot be proved by asking a witness how much a thing is or was damaged: *Sharon Town Co. v. Morris*, 39 Kan. 377 (18 Pac. 230); *Sutherland, Damages*, (2 ed.) § 444.

For respondent there was a brief over the name of *John L. Rand* to this effect.

1. The act of 1872 is a substitute for the act of 1870 so far as concerns sheep, which leaves the common law in force as to uninclosed land, and now applies strictly to Grant County (*Strickland v. Geide*, 31 Or. 373, 49 Pac. 982); and the law of 1891 places Grant County under the act of 1872, and does not include sheep: *Laws 1891*, p. 128; *B. & C. Comp.* §§ 4341, 4344.

2. In general, the proper measure of damages for the destruction or loss of growing crops is the value of the same standing on the ground, and not the loss measured by the rental value of the land: *Byrne v. Minneapolis & St. L. Ry. Co.* 38 Minn. 212 (8 Am. St. Rep. 668, 36 N. W. 339); *Lommeland v. St. Paul, M. & M. Ry. Co.* 35 Minn. 412 (29 N. W. 119); *Folsom v. Apple River L. D. Co.* 41 Wis. 602; *Colorado Consol. L. & W. Co. v. Hartman*, 5 Colo. App. 150 (38 Pac. 62).

3. A witness may state his opinion as to the amount of

damage in cases of this kind: *Watery v. Hiltgen*, 16 Wis. 516; *Bird v. Chicago & N. W. Ry. Co.* 41 Wis. 65; *Woodbeck v. Wilders*, 18 Cal. 131; *Rogers v. Anson*, 42 Hun, 436.

MR. JUSTICE BEAN delivered the opinion of the court.

This is an action to recover damages for the trespass of defendant's sheep upon plaintiff's uninclosed grazing lands in Grant County in the year 1902. Plaintiff had judgment for \$525, and defendant appeals. It is unnecessary to set out the pleadings or the facts in detail. Two questions are presented for decision: (1) Whether an action can be maintained for the depasturing of uninclosed lands in Grant County by sheep under the charge of a herder, without alleging and proving either that the premises were inclosed by lawful fences, or that the sheep were knowingly and wilfully driven and confined upon the land; and (2) error in the admission and rejection of testimony.

1. At common law an owner of domestic animals was required to confine them on his own land, and was liable for any injury done by them to the uninclosed land of another: 2 Waterman, Trespass, § 858; 2 Am. & Eng. Enc. Law, (2 ed.) 351. This rule has in part been abrogated in this State by the several fence laws. In 1870 the legislature passed an act requiring all fields or inclosures to be inclosed by a certain character of fence, and providing that, if any stock broke into such inclosure, the owner should be liable in damages therefor, but excluding the counties of Umatilla, Baker, and Union from its operation: Laws 1870, p. 20. In *Campbell v. Bridwell*, 5 Or. 311, it was held that in the portion of the State where this law applied an action could not be maintained for the trespass of domestic animals without showing an inclosure built in substantial conformity to the statute, and this rule was reaffirmed in *Walker v. Bloomingcamp*, 34 Or. 391 (43 Pac. 175, 56 Pac. 809), and *Fry v. Hubner*, 35 Or. 184

(57 Pac. 420). In 1872 the legislature so amended the act of 1870 as to include Umatilla County only (Laws 1872, p. 15), and at the same session enacted a law "in relation to trespass by cattle, and regulating fences in the counties of Umatilla and Wasco": Laws 1872, p. 123. By section 1 of this latter act it is provided that no action shall be maintained for damages done by certain enumerated animals, not including sheep, unless the person seeking such damages shall allege and prove upon the trial that the premises at the time of the commission of the injury were inclosed with a lawful fence. Section 2 defines what shall constitute a lawful fence within the meaning of the law. Section 3 provides for the seizure of the trespassing stock as security for the payment of the damages done by them, and section 4 that the act shall apply only to the counties of Umatilla and Wasco. Section 2 was amended in 1874 (Laws 1874, p. 65), and as so amended, published in Hill's Compilation of the Laws of Oregon as sections 3452-3455. In *French v. Cresswell*, 13 Or. 418 (11 Pac. 62), *Bileu v. Paisley*, 18 Or. 47 (21 Pac. 934, 4 L. R. A. 840), and *Strickland v. Geide*, 31 Or. 373 (49 Pac. 982), it was decided that in counties to which the act of 1873 applied it is not necessary to fence against sheep, because they were not named in the act; that as to them the common-law rule prevails, and an action can be maintained for trespass on uninclosed lands. This has been the law ever since *French v. Cresswell* was decided, and has been the basis for subsequent legislation. We therefore do not feel like disturbing it, whatever views we might entertain if the question were one of first impression. In 1901 the legislature extended, or endeavored to extend, the act of 1872 so as to include the counties east of the Cascade Mountains, naming them, by amending section 3455 of Hill's, Ann. Laws,*

*NOTE.—Now Section 4344, B. & C. Comp.

being section 4 of the law of 1872: Laws 1901, p. 128. If the latter act is valid, the doctrine of *French v. Cresswell* and the subsequent cases based thereon is applicable to an action for the trespass of sheep in Grant County, and there was no error in the ruling of the court upon that point.

Whether the subject-matter of the amendatory act of 1901 is so far germane to that of the one sought to be amended that it could have been included in the original without violating the provisions of the constitution requiring the subject of an act to be expressed in the title is a question we do not decide, but it is worthy of consideration. See *Ex parte Howe*, 26 Or. 181 (37 Pac. 536).

2. One Deardorf was called as a witness for the plaintiff, and testified that he was acquainted with the premises upon which the trespass is alleged to have been committed, and with the character of the grasses growing thereon. Thereupon counsel for the plaintiff propounded to him the following question: "Do you know how much that land was damaged by reason of the sheep trampling it up and eating it down last year?" to which defendant's counsel objected, on the ground that the question was incompetent, and called for the opinion of the witness. The objection was overruled, and the witness answered: "Well, it would be owing to the way —. If I owned it, I would not have had them on there for seven or eight hundred dollars; and I expect it damaged them the same as it would me. If it was my land I would not have had them on there for seven or eight hundred dollars." A motion to strike out this testimony was overruled. It has often been held that in an action to recover damages a witness may state the facts upon which the damages are predicated, and in a proper case, if qualified, may give his opinion upon a question of value, when material; but he cannot express an opinion as to the amount of damages sustained by the

plaintiff, because that is exclusively within the province of the jury, under the instruction of the court: *Burton v. Severence*, 22 Or. 91 (29 Pac. 200); *Chan Sing v. Portland*, 37 Or. 68 (60 Pac. 718, 15 Am. Neg. Rep. 1); *United States v. McCann*, 40 Or. 13 (66 Pac. 274); *Ruckman v. Imbler Lum. Co.* 42 Or. 231 (70 Pac. 811). The principle upon which this doctrine is founded, and the reasons for it, are set out in the opinions referred to, and need not be again stated. The testimony of Deardorf was in violation of this rule, and was incompetent.

3. The measure of damages was the reasonable value to the plaintiff of the grass or pasturage eaten or destroyed by defendant's sheep, together with the injury, if any, to the freehold. It would have been competent for a qualified witness to give his opinion as to the value of the grass or pasturage eaten or destroyed (*Woodbeck v. Wilders*, 18 Cal. 131; *Lommeland v. St. Paul, M. & M. Ry. Co.* 35 Minn. 412 (29 N. W. 119), but not as to what he might consider the amount in which plaintiff was damaged, for that was the ultimate fact to be determined by the jury.

4. It was also competent for the defendant to show, as he offered to do, that the plaintiff and other parties had cattle grazing on the same land with his sheep during the time of the alleged trespass, and that a part of the injury complained of was caused by such cattle. He is liable only for the mischief done by his sheep, and not for that done by animals belonging to other parties: 2 Waterman, *Trespass*, § 871; *Dooley v. Seventeen Thousand Five Hundred Head of Sheep*, (Cal.) 35 Pac. 1011.

The judgment is reversed, and a new trial ordered.

REVERSED.

Decided 21 March, 1904.

STATE v. HOUGHTON.

[75 Pac. 887.]

CRIMINAL LAW—WAIVING FILING OF MANDATE AFTER REVERSAL.

1. Though a defendant, before a second trial, may insist upon the entering of the mandate of the supreme court reversing a prior conviction (B. & C. Comp. §§ 1487 and 1488), such action is not jurisdictional, and the defendant waives it if the retrial proceeds without the point being urged.

DRAWING TRIAL JURIES IN MULTNOMAH COUNTY.

2. Under Section 976 of B. & C. Comp., providing for the drawing and summoning of jurors in Multnomah County, and Section 986, providing for filling the regular panel when it becomes depleted, the proper practice where several juries are required is to place in each box as they become available the names of jurors occupied in other trials when the selection in question commenced.

IMPEACHMENT—CONTRADICTING IMPEACHING WITNESS.

3. It is competent to show by persons who were present and heard that an impeaching witness is mistaken in saying that statements on a certain subject made by the person impeached were different on a prior occasion from those made in court on the same subject.

COMPETENCY OF TRIAL JUDGE AS A WITNESS.*

4. Under B. & C. Comp. § 856, providing that the judge may be called as a witness by either party, a trial judge is a competent witness in a criminal case to testify that there was no inconsistency between the testimony of a witness at the trial in question and that given by him at a prior trial.

WAIVER OF PLEA OF FORMER ACQUITTAL.

5. The defense of a former conviction or acquittal is one that may be waived by the defendant, being a personal privilege, and must be raised at the trial to be available. When the point is first made on a motion for a new trial it comes too late.

• From Multnomah: ARTHUR L. FRAZER, Judge.

Charles Houghton appeals from a second conviction of robbery.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Wilson T. Hume*.

For the State there was a brief over the names of *Andrew M. Crawford*, Attorney-General, *John Manning*, District Attorney, and *Arthur C. Spencer*, with an oral argument by *Mr. Spencer*.

Mr. Justice BEAN delivered the opinion of the court.

*NOTE.—See notes on examining judge as witness in cause on trial before him: 46 Am. St. Rep. 162 and 81 L. R. A. 465.—REPORTER.

The defendant was tried in December, 1902, on an information charging him with the crime of robbery, and convicted of "assault with intent to rob." Upon appeal the judgment was reversed and a new trial ordered: *State v. Houghton*, 43 Or. 125 (71 Pac. 982). He was again tried on the same information, found "guilty as charged," and sentenced to a term in the penitentiary. From this judgment he also appeals.

1. After the appeal had been taken, it was discovered that the judgment of this court directing a new trial had not been remitted to the court below prior to the second trial, and it is now insisted that the trial court was therefore without jurisdiction. No objection was made to the retrial on the ground that the mandate had not been issued or filed, and the trial court's attention was not called to the omission. It seems to have been assumed by all parties that the mandate had been regularly issued and duly entered, and the defendant states that such was the fact in an affidavit made by him in support of a motion for a new trial. Having thus proceeded to trial without objection, the defendant must be held to have waived the filing of the mandate: 13 Enc. Pl. & Pr. 837; *Becker v. Becker*, 50 Iowa, 139; *Foster v. Jordan*, 54 Miss. 509; *Benzinger Tp. Road*, 135 Pa. 176 (19 Atl. 942). The formal issuing and filing of the mandate was not necessary to the jurisdiction of the trial court or its authority to retry the case. Further proceedings therein, except, perhaps, for special purposes, were suspended pending the appeal. But when the cause was reversed, a new trial ordered, and the appeal finally disposed of, the court below was thereby given authority to proceed with a retrial. The statute requires a certified copy of the judgment of this court on the reversal of a cause, to be remitted to the clerk of the court below (B. & C. Comp. § 1487), and by him entered in the journals: B. & C. Comp. § 1488. This is the official mode of

communicating information of the reversal to the court below, and without a compliance therewith it could not proceed without an objection of the defendant. But it is the judgment reversing the cause and ordering a new trial which gives the trial court authority to proceed, and not the certified copy of such judgment required to be remitted to the clerk of the court below. The latter is but the official evidence, and its production may be waived by the parties, and if, after the reversal, they proceed to trial without objection, they will be held to have made the waiver.

2. The next point urged is that the jury was improperly drawn and impaneled. It appears that before the case was called for trial some of the jurors on the regular panel had been drawn to serve on a jury in another department of the court, and their names were not then in the jury box. The names remaining in the box were exhausted before the jury in this case was completed, and the court ordered that the names of certain of the persons who had previously been drawn to serve as jurors in the other department, but who in the meantime had been excused, be again put into the box, and from these the jury was completed. The defendant objected to the jurors thus drawn sitting in the case because their names were not in the box at the time the drawing began, and also objected to the entire jury because the names of all the jurors were not in the box at that time. But there was no irregularity or impropriety in the procedure adopted. The statute provides, in effect, that in all the counties of the State, except Multnomah, thirty-one jurors shall be drawn and summoned for each term of the circuit court, from which number the grand and trial juries for the term shall be selected. In Multnomah a larger number of jurors may be drawn and summoned when so ordered: B. & C. Comp. § 976. When for any reason the required number of jurors do not attend,

or when a part of them have been discharged, the court has the power to order an additional number drawn to fill up the regular panel: B. & C. Comp. § 986. The object of the statute is that there may be a sufficient number of jurors in attendance on the circuit courts in all the counties of the State other than Multnomah for a grand jury and two trial juries, and in Multnomah a sufficient number to dispose of the business of the several departments of the court properly and expeditiously. In the counties outside Multnomah the law contemplates that a jury may be drawn and impaneled although another may at the same time be deliberating upon a verdict, and in Multnomah more than one jury trial may be in progress at the same time. A litigant is entitled to have the jury for the trial of his cause impaneled from the entire panel in attendance upon the court when it can be done. If, however, a jury previously drawn is engaged in a trial or deliberating upon a verdict, it is, of course, impracticable to have the members thereof impaneled in another case; but when they are discharged or excused from further attendance their names should be immediately restored to the jury box, and may be used in completing a jury that has already been commenced. A failure so to restore the names of the excused jurors would probably be a good ground for discharging a jury otherwise impaneled: *People v. Edwards*, 101 Cal. 543 (36 Pac. 7).

3. For the purpose of impeaching the prosecuting witness, the defendant, after laying the proper foundation, sought to show by the official reporter of the court that his testimony on the former trial on an important point was inconsistent with that given in the case then pending. The State was thereupon permitted in rebuttal, over defendant's objection and exception, to call the bailiff of the court and the presiding judge, to show that there was no inconsistency in the testimony of the prosecuting witness,

but that it was the same on both trials. Objection is made to the competency of this testimony under the rule of many courts that, where an attempt is made to impeach a witness by proving that he has made statements out of court inconsistent with his sworn testimony, it is not competent, for the purpose of sustaining him, to prove that at other times he has made statements out of court consistent with his testimony: 10 Enc. Pl. & Pr. 329; 1 Thompson, Trials, § 573; Wharton, Cr. Ev. (9 ed.) § 492. The evidence offered and admitted, however, was not for the purpose of proving that the prosecuting witness had at some other time than that referred to in the impeaching question made statements consistent with his sworn testimony, but it was with the view of showing that there was no inconsistency in his testimony on the two trials, and that the witness called to impeach him was mistaken. For that purpose it was competent: *State v. Mims*, 36 Or. 315 (61 Pac. 888).

4. Special emphasis is placed upon the objection made to the trial judge testifying in the case. In the absence of a statute making him competent as a witness, the weight of authority seems to be opposed to the admission of such testimony: 3 Rice, Ev. § 196; *Maitland v. Zanga*, 14 Wash. 92 (44 Pac. 117); *People v. Dohring*, 59 N. Y. 374 (17 Am. Rep. 349); *Rogers v. State*, 60 Ark. 76 (29 S. W. 894, 31 L. R. A. 465, 46 Am. St. Rep. 154). The position and influence of the trial judge, the weight his testimony would necessarily have with the jury in case of a conflict with some other witness, and many other reasons which readily suggest themselves to the legal mind point to the conclusion that his testimony would, as said by Mr. Justice DUNBAR in *Maitland v. Zanga*, 14 Wash. 92 (44 Pac. 117), "lead to embarrassment, and would have a tendency to lower the standard of courts and bring them into contempt." But, whatever our conclusion might be if the

question were a judicial one, the statute provides that the judge may be called as a witness by either party, and in such case it has vested in him the discretion of ordering the trial postponed or suspended, and to take place before another judge, or to proceed before him: B. & C. Comp. § 856. There was, therefore, no error under the statute in the judge's testifying in the case at bar.

5. The defendant was convicted on the former trial of an assault with intent to rob, which was deemed a lesser degree of the crime of robbery charged in the information. It is now contended that such verdict and judgment constituted an acquittal of the crime of robbery, and, under the case of *State v. Steeves*, 29 Or. 85 (43 Pac. 947), was a bar to a retrial of the defendant for that crime. This question was not made in the court below except by a motion for a new trial. Some of the courts hold that, where a defendant is convicted of a lesser crime than that charged in the indictment, and thereby acquitted of the greater, and a new trial is awarded, if he desires to rely upon the former judgment as a bar to the greater offense he must plead it, and, unless he does so, he may be legally tried and convicted as charged: *People v. Bennett*, 114 Cal. 56 (45 Pac. 1013); *Jordan v. State*, 81 Ala. 20 (1 South. 577). The authorities, however, are not in harmony on this point; some of them holding that the court will take judicial knowledge of the former proceedings in the case even when they are not pleaded: *Robinson v. State*, 21 Tex. App. 160 (17 S. W. 632); *State v. Martin*, 30 Wis. 216 (11 Am. Rep. 567). All are agreed, however, that the defense of a former acquittal or conviction is a matter personal to the defendant, and one which he must make at the trial, and that it cannot be raised by a motion for a new trial: Wharton, Cr. Pl. & Pr. 477; 1 Bishop, New Cr. Proc. §§ 806, 813; 9 Enc. Pl. & Pr. 631; *State v. Childers*, 32 Or. 119 (49 Pac. 801). As no such defense was

made on the trial, the defendant must be deemed to have waived the right to rely upon a defense of a former acquittal, assuming that it could successfully have been made under the record in this case.

The judgment is affirmed.

AFFIRMED.

Decided 14 December, 1908; rehearing denied 17 October, 1904.

KALYTON v. KALYTON.

[74 Pac. 491, 78 Pac. 332.]

VALIDITY OF INDIAN MARRIAGES — LEGITIMACY OF ISSUE.

1. A marriage between Indians according to tribal custom, followed by cohabitation as husband and wife, is a lawful union under the act of Congress of February 28, 1891 (26 Stat. U. S. 794, c. 383, § 5*), and a child of such a relationship is legitimate for the purpose of determining the descent of land; even though the relationship may have commenced after an allotment of land in severalty under the act of Congress of February 8, 1887, commonly called the "Dawes Act" (24 Stat. U. S. 390, c. 119, § 6†).

EVIDENCE OF INDIAN MARRIAGE.

2. The evidence is satisfactory that the Indian woman Louise married the Indian man Joe Kalyton according to the custom of the Cayuse tribe, of which they were members; that the plaintiff Agnes Kalyton is the lawful issue of that union, though born after her father's death; and, further, that prior to her marriage with Joe Kalyton, Louise was divorced according to the custom of her tribe from all her former husbands.

JURISDICTION MAY BE FIRST QUESTIONED ON APPEAL.

3. Under Section 72, B. & C. Comp., providing that the objection of want of jurisdiction in the court is not waived by failure to demur or answer on that ground, the question may be first suggested on appeal.

INDIAN ALLOTMENTS — EFFECT OF FIRST PATENT.

4. The first patent provided for by the act of Congress of March 3, 1885 (23 Stat. U. S. 340, c. 319, § 1), to be issued to Indian allottees on the Umatilla Indian Reservation is intended to be only a memorandum of the allotment and a declaration of the trust imposed on the United States.

DESCENT OF INDIAN LAND AFTER FIRST PATENT.

5. Between the times of the issuance of the first and second patents to Indian allottees on the Umatilla Indian Reservation provided for by the act of Congress of March 3, 1885 (23 Stat. U. S. 340, c. 319, § 1), an allottee cannot voluntarily alienate the allotted land, or by any act affect the transmission of the title thereof in the course designated by the laws of Oregon. After the issuance of the first patent the land descends as by law provided upon the death of the allottee.

SOURCE OF TITLE OF HEIRS OF ALLOTTEES.

6. *Quære.* Has an Indian allottee on the Umatilla Indian Reservation any estate in the land allotted until issuance of the second patent? And further, if

*8 Fed. Stat Ann. 501. †8 Fed. Stat. Ann. 496.

such an allottee dies before the issuance of the second patent, do the heirs take by inheritance from the allottee or as donees of the United States?

RIGHT OF STATE COURTS TO SETTLE HEIRSHIP OF INDIAN LANDS.

7. A suit to determine who are the heirs of an Indian allottee on the Umatilla Indian Reservation who died between the issuance of the two patents provided for by the act of Congress of March 3, 1885 (23 Stat. U. S. 340, c. 319, § 1), is not a proceeding to enforce the trust reserved by the United States, and is within the jurisdiction of the courts of Oregon. To such a suit the United States is not an indispensable party under the act of Congress of February 6, 1901: 31 Stat. U. S. 760*.

From Umatilla: WILLIAM R. ELLIS, Judge.

This is a suit by Agnes Kalyton, a minor, by her mother, as guardian *ad litem*, to establish her right to certain real property. The transcript shows that about April 21, 1891, Joe Kalyton, an Indian, and a member of the Cayuse tribe, was allotted in severalty 157 acres of land in the Umatilla Indian Reservation. He thereafter lived with the plaintiff's mother, and died intestate about January, 1899, seised of the real property allotted to him, and after his death the plaintiff was born. The defendant Mary Kalyton, his sister, claiming to be his sole heir, took possession of the premises in question, and secured the rents therefrom. The complaint, after alleging the facts, in substance, as hereinbefore stated, avers that about 1893 plaintiff's mother married Kalyton according to the customs and laws of the tribe to which they belonged; that thereafter they lived and cohabited as husband and wife; and that plaintiff is the issue of such marriage, and the sole heir of the deceased. The answer denies the material allegations of the complaint, and, for a further defense, avers that the alleged marriage was not performed according to law, and therefore was void. For a further defense, it is averred that Kalyton and plaintiff's mother, being allottees of land in severalty, were citizens of this State, and that he died unmarried and without lineal descendants. A demurrer to the first separate defense having been over-

*3 Fed. Stat. Ann. 503, 504.

ruled, a reply was filed putting in issue the averments of new matter in the answer, whereupon a trial was had, resulting in a decree that the defendant Mary Kalyton was the sole heir of the deceased, and entitled to the real property of which he died seised, and the plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Henry J. Bean*.

For respondent there was an oral argument by *Mr. Thomas G. Hailey*, with a brief to this effect.

Indians to whom allotments of land in severalty have been made under any law or treaty have the benefits of and are subject to the laws, both civil and criminal, of the state or territory in which they may reside, and are citizens of the United States, and entitled to all the rights, privileges, and immunities of such citizens. Such Indians, being citizens of the United States, are citizens of the State of Oregon, and subject to all its laws, as well as the United States statutes governing them upon reservations: 24 Stats. at Large, 390, § 6; *Wa-la-note-tke-tynin v. Carter*, 6 Idaho, 85 (53 Pac. 106); *State ex rel. v. Norris*, 37 Neb. 299 (55 N. W. 1087, 1089); *State ex rel. v. Denoyer*, 6 N. D. 586 (72 N. W. 1014); *Carter v. Wann*, 6 Idaho, 556 (57 Pac. 314); *United States v. Hadley*, 99 Fed. 437; *United States v. Kopp*, 110 Fed. 165; *In re Celestine*, 114 Fed. 551; *State v. Williams*, 13 Wash. 335 (43 Pac. 15).

There is no common-law marriage in Oregon. Marriages must be solemnized as provided by statute: *Holmes v. Holmes*, 12 Fed. Cas. 412; *Offield v. Davis*, 100 Va. 250 (40 S. E. 910).

MR. CHIEF JUSTICE MOORE, after stating the facts in the preceding terms, delivered the opinion of the court.

1. It is contended by plaintiff's counsel that notwithstanding land in the Umatilla Indian Reservation had been

allotted in severalty to Joe Kalyton, and also to plaintiff's mother, their tribal relations still existed, and, as the testimony shows that they were married according to the customs and laws of the tribe to which they belonged, the court erred in refusing to grant the relief prayed for. It is maintained by the defendants' counsel, however, that the testimony shows that plaintiff's mother was incompetent to enter into a legal marriage, and, this being so, the plaintiff was not born in lawful wedlock, and hence no error was committed as alleged. The Cayuse Indians were recognized as a tribe by the United States June 9, 1855, when a treaty was concluded with them and other Indians, which was ratified by the Senate March 8, 1859, and approved by the President April 11th of that year, setting apart for their exclusive use certain territory in Oregon, which has since been known as the "Umatilla Indian Reservation": 12 Stat. U. S. 945. An act of Congress approved March 3, 1885, authorized the President of the United States, with the consent of the Indians, to allot to the Cayuse and other Indians residing upon the Umatilla Reservation certain areas of land in severalty, and, in addition thereto, to reserve a reasonable amount of pasture and timber lands for their use in common, and also a tract for an industrial farm and school, not exceeding, in all, 120,000 acres. A commission was created to survey the land and make allotment thereof, which, if approved by the Secretary of the Interior, should thereafter constitute the reservation for the Cayuse and other Indians, and within which the allotments were required to be made. The President was also authorized to cause patents to be issued to all allottees, declaring that the United States held the land so allotted for the term of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment was made, or, in case of his death, of his heirs, according to the laws of the State of Oregon, and that at

the expiration of that period the United States would convey the premises by patent to the allottee or his heirs in fee, discharged of the trust, and free of all charge or incumbrance whatsoever. The law of alienation and descent in force in this State was made applicable thereto after the issuance of the patents, except as therein otherwise provided: 23 Stat. U. S. 340, c. 319, § 1.

Section 6 of an act of Congress approved February 8, 1887, generally known as the "Dawes Act," providing for the allotment of land in severalty to the Indians on the various reservations, is as follows: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property": 24 Stat. U. S. 388, 390, c. 119 (3 Fed. Stat. Ann. 496). Section 5 of an act of Congress approved February 28, 1891, amending and extend-

ing the benefits of the act approved February 8, 1887, is, so far as deemed applicable, as follows: "That for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child": 26 Stat. U. S. 794, 795, c. 383 (3 Fed. Stat. Ann. 499, 501).

These excerpts and quotations from the acts of Congress disclose the policy pursued by the United States in dealing with Indians residing upon reservations to whom land has been allotted in severalty, and, though these people have been invested with the rights of citizenship and guaranteed the protection of the laws, and rendered amenable thereto, the object evidently intended to be subserved by such legislation was to encourage them to forsake their primitive ways and to adopt a higher civilization. Reforms of this character are necessarily radical, and not cheerfully submitted to or acquiesced in by uneducated Indians. The change from savagery to refinement is slow, and results from convincing the ignorant of the superior advantages which the latter state affords. The general government, realizing that the task of persuading the older Indians was difficult, has established schools to teach their children the English branches, and to instruct them in the use of tools and implements, thus rendering them self-supporting and partially qualified to compete with the Caucasian race. It is to the younger Indians, then, when removed from the influence of the examples of their parents, and from the teachings and

traditions of their tribes, during the formation of their characters, and when educated in the schools provided for them, that the government must look, to elevate their race. It is quite probable that this conclusion induced the passage of section 5 of the act of Congress approved February 28, 1891 (26 Stat. U. S. 794, 795, c. 383, 3 Fed. Stat. Ann. 499, 501), providing that, for the purpose of determining the descent of land to the heir of any deceased Indian, whenever a male and a female Indian shall have cohabited as husband and wife, according to the custom and manner of Indian life, the issue of such cohabitation shall be deemed their legitimate offspring. Congress thus recognized the validity of Indian marriages, and, though the union may have occurred subsequent to the acceptance of an allotment of land in severalty in an Indian reservation, we believe that if the nuptials were celebrated according to the custom of the tribe of which the parties were members, or to which one of them belonged, and, in pursuance of such union, they have cohabited as husband and wife, the marriage is valid: *Johnson v. Johnson's Admr.* 30 Mo. 72 (77 Am. Dec. 598); *Earl v. Godley*, 42 Minn. 361 (44 N. W. 254, 7 L. R. A. 125, 18 Am. St. Rep. 517); *Bank of Austin v. Sharpe*, 12 Tex. Civ. App. 223 (33 S. W. 676).

In *United States v. Rickert*, 188 U. S. 432 (23 Sup. Ct. 478), Mr Justice HARLAN, in speaking of persons residing on a reservation, to whom allotments of land in severalty had been made thereon, says: "These Indians are yet wards of the nation, in a condition of pupilage or dependency, and have not been discharged from that condition." The allotment of a part of a reservation to Indians in severalty does not terminate their tribal relations, nor remove them from the supervision and control of the interior department of the general government: *United States v. Flournoy L. S. & Rl. E. Co.* (C. C.) 71 Fed. 576. To reach any other conclusion might in some instances

thwart the beneficent purposes of the government, and transfer the title of land donated by it to induce the elevation of a race into another channel, never contemplated, for if a marriage entered into by members of a tribe, according to the customs thereof, is to be held invalid, and the issue illegitimate, the offspring could never inherit from the father, whose real property, if he had no collateral kinsmen, following the rule of descent in Oregon, would escheat to the State: Laws 1903, p. 127. In *McBean v. McBean*, 37 Or. 195 (61 Pac. 418), Mr. Chief Justice WOLVERTON, in speaking of the tribal relations of an allottee on the Umatilla Indian Reservation, makes use of the following language: "And it is the adjudged policy of the law to treat the Indian tribes who adhere to their peculiar customs as separate communities or distinct nationalities, with full and free authority to manage their own domestic affairs, and to pursue their own peculiar habits and customs, especially as it concerns the marriage relation. And this is so although their territory is located within the state lines, and the Federal Government manages their affairs through agencies designated for the purpose." In *State v. Columbia George*, 39 Or. 127 (65 Pac. 604), the same justice, in discussing the rights of the Indians on that reservation, and the paternal exercise of authority over them, further says: "It would seem, therefore, that citizenship, such as extends, within the purview of the Dawes Act, to Indian allottees, is neither inconsistent nor incompatible with the status of a tribal Indian; that the government, while it has bestowed citizenship, has not thereby relinquished the guardianship of the tribes—indulging them yet a little while, but with greatly restricted authority, in their primitive government." Though Indians residing on a reservation, to whom land therein has been allotted in severalty, are classed as citizens, and deemed to be subject to the laws of the state,

the Federal courts only have jurisdiction of grave crimes committed on the reservation by one such Indian against another: *State v. Columbia George*, 39 Or. 127 (65 Pac. 604). This is an admission that notwithstanding the allotment a *quasi* tribal relation still subsists, and that the general government still continues to exercise a paternal care over these wards of the nation, and until that guardianship is removed, the state courts should not interfere with or disturb the domestic relations of such Indians; but, when these relations are involved, it should be the duty of the state courts to determine whether or not they had been entered into or dissolved in accordance with the customs of the tribe.

2. The principal inquiry, therefore, is whether Joe Kalyton and plaintiff's mother were married according to the customs of the Cayuse Indians. Lee Moorehouse, who had been Indian agent at the Umatilla Reservation, appearing as plaintiff's witness, testified that he had observed the customs of the Indians on that reservation, and was asked: "Can you tell the habits of these Indians in regard to marrying, by the Indian custom?" and, over objection and exception, replied: "There doesn't appear to be any regular form they go through in an Indian marriage, and, to get married, they simply go to living together, as near as I understand it." This witness further says that when these Indians concluded to marry they entered into the agreement by mutual consent, and went to living together; that sometimes the man, if he had any property, purchased his wife; and that he understood the Indians considered their form of marriage as sacred as any other. In *Henry v. Taylor* (16 S. Dak. 494, 93 N. W. 641), it was held that in order to show a marriage between two Indians according to the Indian custom, consisting of an agreement to live together, followed by cohabitation, it was necessary to show an express agreement and pursuant cohabitation,

which contract must be evidenced by words disclosing a meeting of minds, uttered in the present tense, for the purpose of establishing the marriage relation. The plaintiff's mother, testifying by an interpreter, says that she lived with Joe Kalyton as his wife five years immediately prior to his death; that they were not married by any regular custom; that he asked her if she would live with him, and she consented; that the young and the old Indians are married in that manner; and that it is an old custom, and she could not tell when it commenced. The testimony of this witness is corroborated by that of Joe Allen, who says that Kalyton and plaintiff's mother lived together as other Indian husbands and wives belonging to that tribe. The defendant Mary Kalyton testifies that her brother and plaintiff's mother lived together as husband and wife according to the Indian customs, in speaking of which she says she was first married in that manner, and lived with her husband one summer, and that they were thereafter married according to the laws of this State. We think the testimony clearly shows a valid and subsisting custom of the Cayuse tribe of Indians, in observing which Kalyton and plaintiff's mother entered into an express agreement, evidenced by words disclosing a meeting of their minds, followed by cohabitation, and, under the rule announced, established the existence of a valid marriage.

It is maintained by defendants' counsel, however, that plaintiff's mother was not competent to enter into a marriage contract at the time or after she commenced living with Kalyton, and, this being so, plaintiff's illegitimacy is established, and no error was committed in decreeing the real property of which he died seised to his sister, as his sole heir. The testimony shows that plaintiff's mother had lived with the following named Indians, as the wife of each, respectively, to wit: Ish-lo-wal-ko, White Wolf,

and Top-la-won. The transcript does not show whether or not the first-named person is dead, but it discloses that the others were living during all the time she lived with Kalyton, Top-la-won having remarried. The plaintiff's mother testifies that she was married to these persons in the Indian manner, and that she ceased to live with and separated from each according to the custom of her tribe. The following question was propounded to the interpreter: "Ask her if she separated or was divorced from White Wolf and these other Indians according to Indian custom, the same as Indians always separated?" and she answered, through him, as follows: "Yes, sir; separated in the Indian way." No evidence was offered tending to show how an Indian divorce is secured, and it is argued by defendants' counsel that the testimony of plaintiff's mother is the mere statement of a legal conclusion, and insufficient to establish the probative facts of the dissolution of the marital relation according to the Indian custom. The legal principle insisted upon would ordinarily be sufficient to defeat the plaintiff's right of recovery, but in the present instance we do not think the rule invoked applicable, for, in settling the pleadings, the court having held that after the allotment of land in severalty a marriage according to law was a prerequisite to the legitimacy of the issue of cohabitation, the subordinate question of the capacity of plaintiff's mother to enter into a marriage contract with Kalyton was not given that degree of attention which its importance demanded. No objection was interposed to the questions propounded to her in relation to her separation from her prior husbands, nor was she cross-examined as to the customs of her tribe in the manner of securing divorces, in view of which we believe the testimony was sufficient to show that she was divorced from them, and was capable of entering into a valid marriage with Kalyton.

It is contended by defendants' counsel that the plaintiff was not born within the period of gestation after the death of Kalyton, and hence no error was committed in rendering the decree complained of. The testimony shows that Kalyton died, as plaintiff's mother testified, a "few days" after the new year, and that her daughter was born "late in the fall—the time the leaves fall off the trees"; that the witness did not know the names of the months, but that plaintiff was born about one month before Christmas, and at the trial her age was "four snows." When it is considered that the knowledge of plaintiff's mother concerning the year seems to be limited to the holidays, and that a "few days" or "one month" are to her vague and indefinite terms, we believe her testimony that Kalyton was the father of her daughter to be true, without discussing the question of how long gestation might be protracted. No testimony having been offered tending to show that plaintiff's mother was dissolute, we conclude that her daughter, the plaintiff herein, was born in lawful wedlock, and is the sole heir of Joe Kalyton, deceased, and, as such, entitled to the possession of the real property of which he died seised. The decree will therefore be reversed, and one entered here in accordance with this opinion.

REVERSED.

Decided 17 October, 1904.

ON MOTION FOR REHEARING.

MR. CHIEF JUSTICE MOORE delivered the opinion.

3. A petition for a rehearing having been filed, it is contended that this suit was instituted to determine, in effect, the title and right to the possession of public land, thereby necessarily rendering the United States a party; but that this cannot be done by a state court, and hence the decree rendered herein is *coram non judice* and void.

The legal principle now insisted upon was not discussed by counsel at the trial in this court, but, as jurisdiction of subject-matter cannot be conferred by consent, is never waived (B. & C. Comp. § 72), and may be invoked for the first time on appeal (*Evarts v. Steger*, 5 Or. 147), it becomes necessary to consider the question presented.

4. The act of Congress approved March 3, 1885 (23 Stat. U. S. 340, c. 319, § 1), providing for the allotment of lands in severalty to the Indians residing upon the Umatilla Reservation, in this State, and prescribing the quantity to be distributed to each person of the various classes, contains the following clause: "The President shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of Oregon, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; *provided*, that the law of alienation and descent in force in the State of Oregon shall apply thereto after patents have been executed, except as herein otherwise provided." An examination of the language quoted will show that, though the issuance of two patents is contemplated, it is evident that the first specified in the act was intended to be nothing more than a certificate or written memorandum to evidence the selection of the land allotted and to declare the trust reserved: *United States v. Rickert*, 188 U. S. 432 (23 Sup. Ct. 478).

5. In our opinion, the word "descent" in the clause stipulating "that the law of alienation and descent in force

in the State of Oregon shall apply thereto after patents have been executed," etc., was intended to render the transmission of an estate by inheritance applicable to the land allotted to an Indian from the time such certificate was issued. The word "alienation" usually means the act by which the title to real property is voluntarily transferred by one person to and accepted by another, and such act is generally accomplished by the execution of a deed or of a will: *Burbank v. Rockingham, etc. Ins. Co.* 24 N. H. 550 (57 Am. Dec. 300). As an Indian cannot voluntarily transfer the title to the land allotted to him until the final patent is issued, it is evident that the word "alienation" was not used in the act under consideration in its technical sense.

6. It is quite probable, however, that until the title is transferred an Indian allottee has no estate in the premises, and that his heirs take as donees of the United States, and not by inheritance from him. The act having provided that after the expiration of twenty-five years from the time of the allotment "the United States will convey the premises by patent" to the allottee or his heirs "in fee," etc., the final patent, when issued, will invest the allottee with an estate in the land that he can "alienate" or "devise," and, as these quoted words were not necessary in the grant of a fee, they, in our opinion, are limited to the first patent issued.

7. The law of descent of this State being applicable on the death of an Indian allottee after the primary patent or certificate is issued, has a state court jurisdiction of the subject-matter, and is its decree determining the heirs in such cases valid? So long as the United States holds the lands in trust for Indian allottees, the title thereto remains in the general government (*United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478), and the question as to whether

or not a final patent therefor shall issue is to be determined by the Secretary of the Interior, thereby depriving state courts of all jurisdiction of the subject-matter: *Mosgrove v. Harper*, 33 Or. 252 (54 Pac. 187); *Moore v. Robbins*, 96 U. S. 530; *United States v. Schurz*, 102 U. S. 378. If this were a suit to enforce the trust reserved, the United States would be an indispensable party (Act Cong. Feb. 6, 1901, 31 Stat. U. S. 760, c. 217; 3 Fed. Stat. Ann. 503, 504, §§ 1, 2); Pomeroy, Remedies, § 356; *Tucker v. Silver*, 9 Iowa, 261; *Hy-yu-tse-mil-kin v. Smith*, 194 U. S. 401, 24 Sup. Ct. 676), and as this cannot be done by a state court the decree rendered herein would be void. The determination by a state court of the heirs of a deceased Indian allottee is not, in our opinion, an execution of the trust: *Bird v. Wimyer*, 24 Wash. 269 (64 Pac. 178); *Bird v. Terry* (C. C.) 129 Fed. 472. The finding of such fact is not an interference with the primary disposal of the soil, but is in aid of the general government in protecting the rights of its *cestui que trust*. Thus in *Kitcherside v. Myers*, 10 Or. 21, it was held that where a person had taken the initiatory steps to secure the title to public land, and received from the proper officers the necessary evidence thereof, he was entitled to the possession of the premises selected, and for any interference therewith by another without legal title or equal equitable claim a state court, upon application of the entryman, would put him in possession of his rights. The rule is settled in this State that a person entitled to the possession of land the title to which is in the United States will be protected in his right by our courts, when his possession has been unlawfully disturbed by another: *Jackson v. Jackson*, 17 Or. 110 (19 Pac. 847); *Hindman v. Rizer*, 21 Or. 112 (27 Pac. 13); *Allen v. Dunlap*, 24 Or. 229 (33 Pac. 675); *Bishop v. Baisley*, 28 Or. 119 (41 Pac. 936); *Pacific Live Stock Co. v. Gentry*, 38 Or. 275 (61 Pac. 422, 65 Pac. 597); *Browning v. Lewis*, 39

Or. 11 (64 Pac. 304); *Moore v. Halliday*, 43 Or. 243 (72 Pac. 801, 99 Am. St. Rep. 724, and note). In the case at bar Joe Kalyton was entitled, during his lifetime, to the possession of the land allotted to him, and upon his death his heirs, under the law of descent in this State, succeeded to his right in the premises. This possession having been disturbed by one who is not his successor in interest or estate, according to such law, the rule established in this State makes it incumbent upon our courts, in aid of the beneficent policy adopted and pursued by the general government in caring for the Indians and in trying to promote their civilization, to declare by solemn decree who is his legal heir.

It is argued, however, that, unless the Indian agent in charge of the Umatilla Reservation voluntarily surrenders to the plaintiff the possession of the premises allotted to the deceased, it will be impossible to enforce the decree herein. It is the duty of the court to declare the law involved in causes submitted, irrespective of the consequences that may result therefrom, and, having faithfully discharged that obligation according to law, as we understand it, we are compelled to adhere to the opinion heretofore announced, leaving the enforcement of the decree to the person in whose favor it was rendered. It follows that the petition should be denied, and it is so ordered.

REHEARING DENIED.

Argued 20 April, decided 16 May, 1904.

EGAN v. NORTH AMERICAN LOAN CO.

[76 Pac. 774, 77 Pac. 892.]

INTERSTATE COMITY — RIGHTS OF RECEIVER.*

1. The comity between states will usually sustain an application by a receiver appointed by a court of one state for possession of the debtor's property in another state, where no rights of citizens of the latter jurisdiction will be thereby prejudiced.

* NOTE.—See notes on rights of foreign receivers in 23 L. R. A. 52 and 846; 18 Am. St. Rep. 344; 36 Am. St. Rep. 905.—REPORTER.

SUIT TO REMOVE CLOUD—PERMISSION TO SUE FOREIGN RECEIVER.

2. A receiver in another state, who is not actually or constructively in possession of certain real property in the state where a suit is brought to quiet title thereto, may be made a party to such suit without permission of the court in which he was appointed: *Thompson v. Holladay*, 15 Or. 34, distinguished.

WHO MAY SUE TO CANCEL BUILDING AND LOAN MORTGAGE—ESTOPPEL.

8. A grantee of real property subject to an usurious mortgage who did not assume the debt, but merely took the land subject to it, may plead usury against the mortgagee as to all payments that have been made: *Irwin v. Washington Loan Assoc.* 42 Or. 105, distinguished.

OPENING DEFAULT—TENDERING PROPOSED ANSWER.

4. An application to set aside an order of default, for whatever reason it may have been entered, must be supported by an answer showing a meritorious defense, a statement that such a defense exists is not sufficient.

RIGHT TO CANCELLATION OF USURIOUS MORTGAGE.

5. Where the payments made on an usurious loan, applied at the legal rate of interest, amount to the sum justly due, the borrower is entitled to have the payments properly applied and the debt and the mortgage securing it canceled.

SERVICE OF COST BILLS IN SUPREME COURT.

6. Section 568, B. & C. Comp., as amended by Laws 1903, p. 209, § 1, relating to the allowance of disbursements in the supreme court, requires that the statement of the items claimed shall be served on the adverse party, whether he has appeared or not, if filed more than five days after the rendition of the judgment or decree—if filed within that time the statement need not be served on any one: *McFarlane v. McFarlane*, 43 Or. 477, and *Anderson v. Adams*, 44 Or. 529, distinguished.

From Multnomah: ALFRED F. SEARS, JR., Judge.

This is a motion to set aside a decree. The facts are that on August 24, 1891, B. F. Egan, plaintiff's husband, being the owner of lots 6 and 7 in block 24 in North Portland, formerly Albina, secured from the defendant the North American Savings, Loan & Building Company, a corporation existing under the laws of Minnesota, a loan of \$1,200, and gave to it his promissory note as evidence thereof, with monthly interest at the rate of 6 per cent per annum, payable after three and before nine years, upon the maturity of thirty-six shares of its capital stock, for which he subscribed. The note was secured by a mortgage on these lots, executed by Egan and his wife, and by an assignment of twenty-four shares of such stock, the remaining shares having been transferred to the corporation as a bonus to secure a loan. Egan made fifty-one monthly payments of \$27.60 each, being sixty cents per share on

the stock for which he subscribed, and \$6 on account of the interest on the loan; and on November 1, 1895, he executed a deed of the mortgaged premises to the plaintiff as a gift, and to avoid the expense of administration in anticipation of his death, which occurred about January, 1896. The plaintiff, after securing the title to the lots, also paid nineteen like monthly installments, and thereafter, insisting that the debt was discharged, instituted a suit in the circuit court for Multnomah County to cancel the mortgage, joining Edward B. Graves as a defendant, alleging that on account of the insolvency of the corporation he had been appointed its receiver by the District Court of the Second Judicial District for Ramsey County, Minnesota, and that the mortgage had been assigned to him. The defendants not being residents of, nor found within, this State, the summons was, by order of the court, served by publication, and, due proof thereof having been made, a decree was entered April 21, 1902, canceling the mortgage. Before the expiration of a year from the rendition of the decree, Graves moved the court to set aside the default, and to permit an answer to be filed, supporting his motion by affidavits tending to show that he had no knowledge that the suit was pending until after the decree was rendered, and that by mistake and excusable neglect the defendants had been deprived of their day in court. He also tendered an answer which denied some of the averments of the complaint, admitted the payments claimed to have been made by plaintiff and her husband on account of the loan, but alleged that, according to the method adopted by the corporation of applying the money so received, the debt had been reduced only to the extent of \$122.40, leaving due thereon \$1,097.60, and prayed that the mortgage might be foreclosed, and the lots sold to satisfy such liability. The motion was denied, and the defendants appeal.

AFFIRMED.

For appellant there was a brief over the name of *Platt & Platt*, with an oral argument by *Mr. Harrison G. Platt*.

For respondent there was a brief and an oral argument by *Mr. Michael G. Munly*.

MR. CHIEF JUSTICE MOORE, after stating the facts in the foregoing terms, delivered the opinion of the court.

1. It is contended by defendants' counsel that plaintiff, having alleged that Graves was appointed receiver of the defendant corporation, neglected to aver that she had secured leave of court to institute proceedings against him, and, this being so, the complaint failed to state facts sufficient to constitute a cause of suit, and an error was committed in overruling the motion. Our statute, in defining the office of a receiver and prescribing the duties devolving upon him; is as follows: "A receiver is a person appointed by a court or judicial officer to take charge of property during the pendency of a civil action, suit, or proceeding, or upon a judgment, decree, or order therein, and to manage and dispose of it as the court or officer may direct": B. & C. Comp. § 1080. It is the court, by its agent, the receiver, that takes possession of the property in controversy *pendente lite*, or after judgment or decree, for the benefit of the persons entitled thereto, when it does not deem it proper that either party should have control thereof: Beach, *Receivers* (Alderson's ed.), § 2. "The possession of the receiver," says Mr. Justice BALDWIN, in *Beverley v. Brooke*, 4 Grat. 187, "is that of the court, and any attempt to disturb it without leave first specially granted will be a contempt, and may be punished as such." Mr. Justice THAYER, in *Thompson v. Holladay*, 15 Or. 34 (14 Pac. 725), in speaking of the right of creditors to institute actions against a receiver, says: "They may bring and maintain suits against the receiver in his official capacity almost as a matter of course, and obtain judgments against him

binding the estate, subject to the equities of other parties interested in it. They are compelled, it is true, to obtain leave of the court having custody of the property to bring their suits against the receiver, but that requirement is imposed to prevent vexation and confusion; and they may maintain suits against the debtor in any forum as a matter of right, but the judgment recovered in such case will not bind the receiver, or compel him to do anything in aid of its enforcement." Further in the opinion it is observed: "There is no principle better established than that, where property in litigation is taken into the custody of the court, through the intervention of a receiver, a party interested cannot go into another forum and establish any claim to it. The court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and, incidentally, to take possession and control of the subject-matter of the suit, to the exclusion of all interference from other courts of concurrent jurisdiction. The principle grows out of a spirit of comity, which has the highest aim for the public good, and without the observance of which conflicts of a serious nature would be likely to arise." The several states of the Union are independent, and, as to each other, foreign, governments, from which it results that the laws of one state and the judgments and decrees of courts rendered in pursuance thereof have no binding force or effect beyond its borders: 23 Am. & Eng. Enc. Law, (2 ed.) 1108.

Where no vested or accrued rights of the citizens of a state have intervened, the principle of comity prevails by which a receiver appointed by a court of another state may, by appropriate proceedings, be permitted to take possession of a debtor's property in the latter state: *Gilman v. Ketcham* 84 Wis. 60 (54 N. W. 395, 23 L. R. A. 52, 36 Am. St. Rep. 899); *Hunt v. Columbian Ins. Co.* 55 Me. 290 (92 Am. Dec. 592). This is usually accomplished by

an ancillary suit in which a foreign receiver is permitted by a court of another state to take possession of property involved in the litigation that is situated within its jurisdiction, thereby investing him with the measure of power delegated: *Rust v. United Waterworks Co.* 70 Fed. 129 (17 C. C. A. 16). No rule of comity, however, requires a court in which a debtor's property is situated to abdicate its jurisdiction of the *res* when the rights of its citizens would be thereby prejudiced: *City of Fort Dodge v. Minneapolis & St. L. Ry. Co.* 87 Iowa, 389 (54 N. W. 243); *Holbrook v. Ford*, 153 Ill. 633 (39 N. E. 1091, 27 L. R. A. 324, 46 Am. St. Rep. 917); nor can a foreign receiver, without the court's permission, sue to recover the possession of such property: *Booth v. Clark*, 58 U. S. (17 How.) 321. In deciding that case Mr. Justice WAYNE, in speaking of a receiver, said: "If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be difficult to do, where it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as receiver." But, as was said by Mr. Justice DANFORTH in *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367 (38 Am. Rep. 518), in speaking of the right of commissioners, appointed by a court in Louisiana, to enforce in New York the payment of a claim of their insolvent debtor: "Once properly in

court and accepted as a suitor, neither the law nor court administering the law will admit any distinction between the citizens of its own state and that of another." If, under such rule of comity, Graves had been appointed or recognized as the receiver of the defendant corporation by a court of this State, so that leave to prosecute the suit could have been secured, a different question might be presented, and a variant rule applied.

2. The suit was instituted to cancel a lien on the ground that the debt secured thereby was paid, which was tantamount to the removal of a cloud from the title to real property, requiring a trial of that cause in the forum where the premises were situated. The rules of law do not impose upon a party the performance of vain things, and, this being so, no necessity existed for applying to the Minnesota court for leave to institute a suit in the courts of this State, in which the right involved could only be enforced. The receiver, Graves, undoubtedly was the holder of the promissory note given by Egan, and was also the assignee of the mortgage, which was an incident thereof; but he was not in, nor entitled to, the possession of the mortgaged lots, and a complaint in a suit against a receiver to recover real property which does not show that he is in possession thereof is not subject to demurrer: *Fort Wayne, etc. R. Co. v. Mellett*, 92 Ind. 535. We think the complaint stated facts sufficient to entitle plaintiff to the relief demanded, for, Graves not being in the actual or constructive possession of the property, it was not *in custodia legis*, and hence it was not necessary to secure leave of court to institute the suit, or to allege such fact in the complaint.

3. It is maintained by defendants' counsel that, the mortgaged premises having been conveyed to the plaintiff, she is not entitled to an application of the payments made by her husband, except in the manner prescribed by the

rules of the corporation, thus showing that there is due it the sum claimed; and for this reason an error was committed in refusing to set aside the decree. In *Irwin v. Washington Loan Assoc.* 42 Or. 105 (71 Pac. 142), it was held that a purchaser of real property subject to an usurious mortgage, who had assumed and agreed to pay the debt as a part of the purchase price, could not plead the usury in a suit to foreclose the lien. The reason for this rule rests upon the theory that the mortgagor puts into the hands of the purchaser a fund with which to pay the debt, and it would be fraud to permit the latter to avoid his covenant and escape liability on account of usury when the mortgagor had waived his personal privilege, or was unwilling to make such a defense. This rule, however, can have no application to the case at bar, for plaintiff was a party to the mortgage, and the premises were conveyed to her by her husband in anticipation of his death, to avoid the expense of an administration upon his estate, and not for the purpose of creating a fund for the payment of the debt, thereby entitling her to an application of the payments made by the mortgagors in satisfaction of their obligation: *Epping v. Washington Invest. Assoc.* 44 Or. 116 (74 Pac. 923).

4. It is insisted by defendants' counsel that, their clients having, within the time prescribed by the statute (B. & C. Comp. § 103), moved the court to set aside the decree on the ground that it was taken against them through their mistake, inadvertence, surprise, and excusable neglect, and having submitted conclusive evidence thereof, the court erred in denying the motion. Before the receiver was entitled to have the decree set aside for the reasons assigned, it was incumbent upon him to tender an answer showing a meritorious defense: *Mayer v. Mayer*, 27 Or. 133 (39 Pac. 1002).

5. It will be remembered that such pleading admitted the payments claimed to have been made by the plaintiff in her complaint; and a monthly application thereof in discharge of the debt, allowing interest on the several new principals at the rate of 6 per cent per annum, shows that prior to the conveyance of the premises to her, the entire sum and interest due the corporation had been paid by her husband, notwithstanding which she made nineteen further payments; thereby showing that the answer tendered does not afford a meritorious defense: *Washington Invest. Assoc. v. Stanley*, 38 Or. 319 (63 Pac. 489, 58 L. R. A. 816, 84 Am. St. Rep. 793); *Western Sav. Co. v. Houston*, 38 Or. 377 (65 Pac. 611); *Pacific Build. Co. v. Hill*, 40 Or. 280 (67 Pac. 103, 56 L. R. A. 163, 91 Am. St. Rep. 477.)

For these reasons no error was committed in refusing to open the decree, and the order of the court in this respect is affirmed.

AFFIRMED.

Decided 5 July, 1904.

ON MOTION TO STRIKE COST BILL.

PER CURIAM. The respondent, who was successful in this court, filed her statement of disbursements on May 21, the decree having been rendered May 16, and the appellants now move to strike it out because it was not served upon them.

6. The question involved depends upon a construction of Section 568, B. & C. Comp., as amended by the legislative assembly in 1903: Laws 1903, p. 209. It now reads: "No disbursements shall be allowed to any party, unless he shall serve on such adverse party or parties as are entitled to notice by law, or rule of the court, and file with the clerk of such court within five days after the rendition of the judgment or decree, a statement, with proof of

service thereof, if notice to the adverse party is required, indorsed thereon or attached. * * Such statement of disbursements may be filed with the clerk at any time after said five days, but not later than the first day of the next regular term of court occurring after the expiration of said five days; but in such case, such statement must be served on the adverse party or parties whether he or they shall have appeared or not." It is not entirely apparent what was intended by this statute, but from a survey of it in its entirety it seems to us that it is susceptible of no other construction than that service of the statement is not required to be made upon the adverse or any party if filed within five days after the rendition of the judgment or decree. It shall be served upon such adverse party or parties as are entitled to notice by law or rule of the court. There is no law, so far as we are advised, or rule of this court, entitling any adverse party to notice of a proceeding of this nature. The term "notice" is employed merely in the abstract, and what notice is intended, whether of a motion or of appeal or otherwise, is not specified. The last clause of the above excerpt would seem to suggest that the statute has reference to a notice of appeal, as only such party or parties as have appeared in the action or suit are entitled to such notice, and that the statement should be served upon such as have appeared. But the statute does not say so, and we are not permitted to read into it anything of the kind for the purpose of construction. The statute has used the term in a general sense, and if there was a law or rule of the court requiring notice of all papers filed, or other proceedings, to be served upon certain adverse parties, then a notice of filing such a paper as a statement of disbursements would be included, but, as it concerns this court, there is no such law or rule. So we conclude, as above suggested, that a statement of disbursements, if filed with the clerk of this court within five days

after the rendition of judgment or decree, is not required to be served upon any adverse party. If not filed within five days, the statute requires its service upon the adverse party, whether he has appeared or not. The cases of *McFarlane v. McFarlane*, 43 Or. 447 (73 Pac. 203, 75 Pac. 139), and *Anderson v. Adams*, 44 Or. 529 (76 Pac. 16), are not in conflict with this holding. The former decides that a statement of disbursements filed after the first day of the succeeding term of this court occurring more than five days after the rendition of the judgment or decree could not be allowed, and the latter case simply holds that a statement of costs filed after five days, without service upon the adverse party, will be stricken from the record. The motion to strike out the statement here will therefore be denied, and it is so ordered. MOTION OVERRULED.

Decided 16 May, rehearing denied 5 July, 1904.

THOMPSON v. HIBBS.

[76 Pac. 778.]

AMENDING COMPLAINT — DISCRETION — EXAMPLE.

1. The use of the word "amend" in reference to a pleading necessarily implies that there is already something to correct or enlarge upon, and the practice in permitting amendments is quite liberal in this State, unless the pleading is utterly wanting in essential allegations: for example, a complaint in a suit between sureties for contribution which contained the title of the court, and the names of all the parties, an allegation of the making of a note by the plaintiff, the defendants and another, and the death of the latter, a statement of the payment of such note by plaintiff, that only a part of it had been repaid, and the proportionate liability of each defendant, though defective in that it did not show for whose benefit such note was made, or that either the plaintiff or any of the defendants were sureties thereon, still contained enough of a cause of suit to justify an amendment, in the discretion of the trial court.

ACTION OR SUIT — EFFECT OF ALLEGATIONS.*

2. A complaint containing allegations that show an equitable cause only is still in equity, though it may have been called an action — the nature of the proceeding is determined by the statements in the pleading and not by what it may be called by the pleader.

*See also *Beach v. Guaranty Sav. Assoc.* 44 Or. 530 (76 Pac. 16).—REPORTER.

QUESTION FIRST URGED ON APPEAL—DEFECT OF PARTIES.

3. An objection of want of parties is waived unless urged in the trial court, and cannot be first made in the supreme court: B. & C. Comp. §§ 68 and 71.

COMPUTING INTEREST WHEN RATE HAS BEEN CHANGED.

4. The rate of interest having been changed during the interest period of an implied contract, the amount due should be computed at the old rate to the time of the change, and thereafter at the new rate.

From Multnomah: JOHN B. CLELAND, Judge.

Proceeding by T. W. Thompson against J. D. Hibbs and E. H. Jeter. In March, 1903, the plaintiff commenced a proceeding in the circuit court for Multnomah County against the defendants jointly, to recover \$205 from each of them, with interest since July 1, 1901. The complaint states, in substance, that plaintiff "for his cause of action" alleges that on December 16, 1896, he and the defendants, together with one Rogers, made their joint and several promissory note to the Bank of Forest Grove for \$600, due ninety days after date, with interest at the rate of 10 per cent per annum, in which they agreed to pay a reasonable attorney fee in case of suit or action; that on April 3, 1897, the plaintiff paid the note in full, together with interest thereon, no part of which has been repaid to him, except \$257.58 by the Gaston Coöperative Milling Company; that Rogers has died since signing the note; that defendants are indebted to plaintiff thereon for one third of the amount due, to wit, \$400, with interest at the rate of 10 per cent per annum since July 1, 1901; that \$50 is a reasonable attorney's fee for bringing "this action." The prayer is for judgment against the defendants for \$205 each, with interest since July 1, 1901, at the rate of 10 per cent per annum, and the sum of \$50 as attorney's fees and costs and disbursements. The complaint is verified by the attorney for the plaintiff, who says that he makes the affidavit for the reason that "this action" is based upon a written promissory note for the payment of money only, and that such note was then in his possession.

A summons, similar in form to those in ordinary actions at law, was issued and served upon the defendants, who appeared and demurred to the complaint on the ground of a misjoinder of causes, and because it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, but upon an appeal the judgment was, on motion of plaintiff, reversed *pro forma*, and the cause remanded to the court below for such further proceedings as might be deemed proper. Upon an application to the trial court, the plaintiff was allowed to file an amended complaint, in which he alleges, in addition to the facts set out in his original complaint, that the promissory note given by himself, Rogers, and the defendants to the Bank of Forest Grove was for money borrowed by them for the use and benefit of the Gaston Coöperative Milling Company, and that such money was used by that company, and the note was given for its benefit and accommodation; that the milling company repaid to the plaintiff the interest on the note to July 1, 1901, but nothing further has been paid thereon; that Rogers was insolvent when he died, and by reason of the premises the defendants have each become liable to contribute to the plaintiff one third of the amount paid by him to satisfy the note, with interest since July 1, 1901, at 6 per cent per annum, and prays judgment of the court accordingly. A demurrer to this complaint was sustained on the ground that it did not state facts sufficient to constitute a cause of action, and the plaintiff filed a second amended complaint, which is in substance the same as the first, except that it alleges the insolvency of the milling company.

A motion to strike it from the files on the ground that the proceeding as originally commenced was an action at law, and the court had not power to permit the complaint to be so amended as to state a cause of suit in equity, was overruled, and the defendant Jeter answered. In his

answer he avers that the milling company had repaid plaintiff \$257.58 on the amount paid by him to satisfy the note, in addition to the sums alleged in the second amended complaint, and prayed that if the plaintiff be permitted to recover at all he recover from him only one fourth of the sum of \$500, with interest at 6 per cent since July 1, 1901. A reply was filed, admitting the payments as alleged in the answer, averring that at the time plaintiff paid and discharged the note the legal rate of interest was 8 per cent per annum, and at such rate there was due him on July 1, 1901, \$540.25, after deducting all payments made thereon, and praying judgment against Jeter for one third of such amount, with interest at 8 per cent per annum from such date. Hibbs made default, and upon the pleadings the court rendered judgment in favor of the plaintiff against Hibbs and Jeter for \$216.43 each, being one third of the amount paid by plaintiff in satisfaction of their joint note, after deducting the payments made thereon, including interest at 8 per cent per annum. From this judgment the defendants appeal, contending (1) that the original complaint was so lacking in substance that it could not be amended ; (2) that it attempted to state a cause of action at law, while the amended complaint endeavors to allege facts requiring the interposition of a court of equity ; and (3) that the judgment is for a larger sum than plaintiff was entitled to recover in any event.

MODIFIED.

For appellant there was a brief and an oral argument by *Mr. Samuel B. Huston*.

For respondent there was a brief and an oral argument by *Mr. Julius C. Moreland*.

MR. JUSTICE BEAN, after stating the facts in the foregoing terms, delivered the opinion of the court.

1. Before there can be an amended pleading there must, of course, be something to amend, otherwise the pleading when filed will be an original and not an amended one; but, in our opinion there was sufficient in the original complaint to justify the court in permitting an amendment. It contained the title of the court and the names of the parties, alleged the making of the joint and several promissory note by the plaintiff and the two defendants and Rogers, the payment thereof by the plaintiff, the fact that no part of the money so paid by him had been returned except certain sums, the death of Rogers, and the liability of each of the defendants to the plaintiff for an undivided one third the amount paid by him, and prayed judgment against them for such amount. It is admitted that the complaint did not state facts sufficient to constitute a cause of action at law or a suit in equity by one surety against another for contribution, because it did not allege the name of the party for whose benefit the note was made, or that plaintiff and defendants were sureties thereon; but it manifestly attempted to state such a cause, and, however imperfect it may have been, it was sufficient to justify the trial court, in the exercise of a sound discretion, in permitting an amendment, under the liberal rules which prevail in this State: *York v. Nash*, 42 Or. 321 (71 Pac. 59).

2. It is insisted that the second amended complaint states or attempts to state facts requiring the interposition of a court of equity, while the original complaint was an action at law, and that the court erred in permitting an amendment which changed or attempted to change the proceeding from an action at law to a suit in equity. Conceding, for the purposes of this case only, that under our system litigants are compelled at their peril properly to designate or entitle proceedings commenced by them—that is, whether at law or in equity—and that one who

files a complaint at law, and finds he is mistaken in the forum having jurisdiction to grant the relief to which he is entitled under the facts stated, cannot amend so as to change the jurisdiction to the equity side of the court, we yet do not think the doctrine applicable here. Although the original proceeding in question was designated and conducted throughout as an action at law, the nature of the relief sought and the facts alleged, or attempted to be alleged, entitle the plaintiff to relief in equity only. Where one surety is compelled, on account of the neglect or failure of the principal, to pay or discharge a common debt, he has a right to contribution from his co-sureties, which he may enforce either at law or in equity. At law, however, he must bring an action against each surety separately for his aliquot part, which is all that can be recovered, even when one or more of the sureties are insolvent. In the latter case the proceeding must be in equity against all the co-sureties, and, upon proof of the insolvency of one or more, the payment of the amount will be distributed among the solvent parties in due proportion: *Fischer v. Gaither*, 32 Or. 161 (51 Pac. 736); *Easterly v. Barber*, 66 N. Y. 433. When, therefore, the plaintiff commenced a proceeding for contribution jointly against two of his three co-sureties, it was necessarily in equity, whatever name his counsel may have been pleased to give it. Its nature and character, from a legal point of view, are to be determined from the facts as pleaded, or attempted to be pleaded, and the relief sought, and not from what it may be called. The complaint did not change the proceeding from equity to law by simply calling or designating it as "an action," when, under the facts, relief could be granted only in equity. Thus, in *Beach v. Guaranty Sav. Assoc.* 44 Or. 530 (76 Pac. 16), the plaintiff brought what he denominated an "action at law." The

trial court held, however, that upon the facts stated it was a suit in equity, and overruled plaintiff's motion for a jury trial. The plaintiff declining to proceed further, the complaint was dismissed, and on appeal the decree was affirmed on the ground that the proceeding was in equity. Under our system, law and equity courts are presided over by the same judge, and it would be sacrificing justice to the merest technicality to hold that a plaintiff was not entitled to invoke the jurisdiction of the tribunal competent to grant him relief because he had mistakenly designated his proceeding in the other forum. We are therefore all agreed that the amendment allowed in this case did not in fact change an action at law to a suit in equity.

3. It is claimed that the amended complaint as filed did not state facts sufficient to constitute a cause of suit, because the Gaston Coöperative Milling Company and the personal representatives of Rogers are not parties. No such objection was made in the court below, and it is therefore waived: B. & C. Comp. §§ 68, 71; *State ex rel. v. Metschan*, 32 Or. 372 (46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692).

4. In giving judgment, the court computed interest on the amount paid by the plaintiff to satisfy and discharge the promissory note to the Bank of Forest Grove at the rate of 8 per cent per annum to the date of the decree. This was error. The interest should have been computed at 8 per cent until the time the rate was changed in October, 1898, and from that time at 6 per cent: *Graham v. Merchant*, 43 Or. 294 (72 Pac. 1088). The decree will be modified accordingly; neither party to recover costs in this court.

MODIFIED.

Argued 21 April, decided 16 May, 1904.

LIVESLEY v. HEISE.*

[76 Pac. 952.]

MUTUALITY OF HOP CONTRACT IN QUESTION.

1. A contract by which one party sells and agrees to deliver to the other party a certain part of particular crops to be raised during a series of years, and such other party agrees to buy such part of said crops at a specified price, payable in certain installments, if, in the purchaser's judgment, the condition of the crop will warrant it, and to advance each year certain amounts for cultivation, to be deducted at the time of the final payment, provided that in case of a shortage in the crop from causes beyond the control of the first party, he shall be liable to repay only the advances, is mutual and enforceable.

SPECIFIC PERFORMANCE OF SALE CONTRACT—FRAUD BY VENDOR.

2. A fraudulent combination between one who has contracted to sell property not yet in existence, a crop to be grown, for example, and others, to avoid compliance with the contract, is ground for equitable relief by requiring specific performance.

From Polk: REUBEN P. BOISE, Judge.

This is a suit by T. A. Livesley and another, partners as T. A. Livesley & Co., against A. Heise and others, to compel the specific performance of a contract for the sale and delivery of hops, made and entered into January 22, 1901, between the defendant A. Heise, of the first part, and the plaintiffs, T. A. Livesley & Co., of the second part. Its provisions, so far as they are material, are as follows:

"The Party of the First Part has bargained and sold, and by these presents does grant, sell, and convey unto the said parties of the second part, thirty thousand pounds (net weight) of his crop of hops, the growth of the years 1901, 1902, 1903, 1904, and 1905, grown on Emerson Harris' and Mrs. N. W. Harris' farm, situated on right and left side of main road between Bethel and Independence three miles south of Bethel, in Polk County, State of Oregon, of which farm forty acres are set out in hops, and are now being by him cultivated, and which are to be harvested during the years 1901, 1902, 1903, 1904, and 1905, to have and to hold the same unto said T. A. Livesley & Co., their executors, administrators, or assigns forever.

* NOTE.—A motion to dismiss the appeal herein was overruled on April 4, 1904. There was a memorandum opinion only, following *Livesley v. Johnston*, ante, p. 80.—REPORTER.

"The Said Party of The First Part Hereby Agrees to complete the cultivation of the said hop crop and to harvest, cure, and bale the same in good first-class and workmanlike manner, and immediately thereafter, and not later than Oct. 13th of each year to deliver the 30,000 pounds of the same in bales of about one hundred and eighty-five pounds each, in new 24-oz. bale cloth (seven pounds tare per bale to be allowed) at Crowley, Oregon. Said hops when delivered are to be not the product of a first year's planting, and not affected by spraying or mould, and are to be of choice quality and in sound condition, good color, fully matured, cleanly picked, free from vermin damage, properly dried and cured, and in good merchantable order and condition, and shall be delivered in lots of not less than entire contract bales, to the said parties of the second part, their agents, executors, administrators, or assigns; and the said party of the first part further agrees that this contract has preference, both as to quantity and quality, over all other contracts made as to said growth of hops by said party of the first part with any other purchaser, and it is understood and agreed that said parties of the second part, or their agent, may at any time after the execution of this agreement, have full and free access to and upon said described premises. Said party of the first part further agrees at least ten days before baling said hops, that he will notify said parties of the second part, or their agents, in writing, of the time at which he will be in readiness to deliver said hops, which said notice shall be personally served upon said parties of the second part. or their agent.

"It is Further Agreed that when the said hops are delivered they may be inspected by the parties of the second part, or by an agent selected by said parties of the second part, at the time of the delivery of any lot thereof, or at any time thereafter within ten days after delivery of the entire quantity hereby bargained and sold shall have been completed, and should said hops, or any part thereof, not be delivered in the condition herein agreed upon, according to the judgment of said parties of the second part, or their said agent, the said party of the first part shall, upon demand, repay to said parties of the second part such sums of money

as they may have advanced on the said crop, with interest at the rate of eight per cent per annum from the date when advanced, and this instrument shall be a chattel mortgage on the entire crop of hops raised on the above-described land to secure the payment of said sums advanced and interest and the performance of all the provisions hereof; and if not paid upon demand, the said parties of the second part may forthwith and without further notice take possession of said hops and sell the same, with or without notice to the party of the first part, upon ten days' advertisement as herein provided, and out of the proceeds retain such sums and interest and all costs, including attorney's fees, rendering the surplus, if any, to the party of the first part. * *

"And in consideration of the foregoing, said Parties of The Second Part do Hereby Agree to pay to said party of the first part the sum of ten cents per pound for each pound of hops delivered and accepted on the conditions stipulated for, that is to say \$100 paid upon signing of these presents, the receipt whereof by said party of the first part is hereby acknowledged; five cents per pound for each pound of hops hereby bargained to be paid at the time of picking said hops, upon ten days' notice from said party of the first part, if in the judgment of the parties of the second part the crop is in fit condition to warrant the advances, and the balance, if any there may then be due, after delivery of the entire amount bargained and sold to and accepted by said parties of the second part at the time and place and in the condition as hereinbefore provided.

"It is Further Agreed that all advances made, as hereinbefore provided, shall bear interest at the rate of eight per cent per annum up to the time of acceptance of all said hops by said parties of the second part, and that the parties of the second part, through their agents, shall have the right to determine at picking time, when said advances are contemplated to be made, whether or not the growing crop at that time is in proper condition, and if such agents of the parties of the second part shall determine that the growing crop is not in such condition, then said parties of the second part shall be released from any obligations to furnish picking money as called for in this contract. The

party of the first part shall not be liable (except to repay advances) for any shortage on delivery due to causes beyond his control. * *

"It is Further Agreed by the parties of the second part that they are to advance each year the sum of three hundred dollars with the exception of the first year, 1901, which said year they have agreed to advance four hundred dollars, during the months of April and May, for eight per cent, and to be deducted from the purchase price of hops when contract is delivered."

The complaint sets out the contract, and, further, that at the time of the execution thereof the defendant A. Heise was a tenant and in possession of the land described therein, which he had previously leased from N. W. and E. L. Harris, under a lease to expire about October 26, 1905; that plaintiffs have performed all the terms and conditions of the contract on their part, but that defendant A. Heise has refused to perform, and has conspired with his codefendant Rachael E. Heise, his wife, and W. C. Heise, his son, to defraud plaintiffs — that is to say, he voluntarily and unlawfully, and with intent to defraud plaintiffs, surrendered up to said N. W. Harris and E. L. Harris his said lease for the premises, and pretended to have the same canceled and to surrender possession of said premises to them, but that in fact they were not so surrendered; that the defendant A. Heise, notwithstanding, continued in possession under an agreement with the owners that they would immediately lease the premises to his wife and son; that the latter have ever since, with full knowledge of the contract of sale, pretended to conduct said hop yards and farm in their own names, but that it was done with the sole purpose of assisting A. Heise in circumventing plaintiffs and defrauding them out of their rights under their contract; that there were produced upon the premises during the present year (1903) 175 bales of hops, as the net share of the tenants, which in reality belong to the defendant A. Heise;

that he has refused to accept from plaintiffs any of the advances agreed to be made, they having been duly tendered, and has refused to deliver the hops produced, as stipulated; that he is insolvent; that plaintiffs have no plain, speedy, and adequate remedy at law, and have tendered into court for defendants \$3,000, the full contract price of the hops. A decree is demanded, declaring the transactions between the defendant A. Heise and Rachel E. and W. C. Heise fraudulent and void as to plaintiffs, and that they be required to deliver to plaintiffs so much of the crop produced as will make 30,000 pounds, and for such other relief as may seem equitable. A demurrer having been sustained to the complaint, and a decree entered dismissing the suit, plaintiffs appeal. REVERSED.

For appellants there was an oral argument by *Mr. Wirt Minor* and *Mr. Woodson T. Slater*, with a brief over the names of *W. T. Slater*, *Wm. M. Kaiser*, and *Teal & Minor* to this effect.

In contracts for the sale of personal property or a certain kind or quality or in a certain condition the seller must deliver the property to the buyer according to the terms of the agreement, and upon such delivery the buyer has the right of inspection, and is bound to take the property only if it be in fact of the kind or quality, or in the condition, bargained for; but if he rejects the proffered articles when they are as bargained for, he is liable to the seller. The parties may agree upon the inspector, and then both parties are bound by his decision, unless it be shown that he acted fraudulently, capriciously, arbitrarily, or in bad faith: *Mack v. Slateman*, 21 Fed. 109; *Bentley v. Davidson*, 74 Wis. 420; *Wendt v. Vogel*, 87 Wis. 462; *Linch v. Elevator Co.* 80 Tex. 23; *Martinsburg & P. R. Co. v. March*, 114 U. S. 549; *Kihlberg v. United States*, 97 U. S. 398; *Sweeney v. United States*, 109 U. S. 618; *Railroad Co.*

v. *Price*, 138 U. S. 185; *Chapman v. Lowell*, 5 Cush. 378; *North Pac. Lum. Co. v. East Portland*, 14 Or. 3; *Pope v. Allis*, 115 U. S. 363; *Faulkner v. Hebard*, 26 Vt. 452; *Parson v. Woodward*, 22 N. J. L. 196; *Dambmann v. Lorentz*, 70 Md. 380.

For respondents there was an oral argument by *Mr. Geo. G. Bingham* and *Mr. Peter H. D'Arcy*, with a brief over the name of *Mr. Bingham* to this effect.

(1) A contract to be enforceable must be mutually binding upon the parties, so that each may maintain an action against the other for a breach thereof: *Woolsey v. Ryan*, 59 Kan. 601 (54 Pac. 664); *Missouri, K. & T. Ry. Co. v. Bagley*, 60 Kan. 424 (56 Pac. 759); *Cummer v. Butte*, 40 Mich. 322 (29 Am. Rep. 530); *Davie v. Lumberman's Min. Co.* 93 Mich. 491 (53 N. W. 625, 24 L. R. A. 357); *Teiple v. Meyer*, 106 Wis. 41 (81 N. W. 982); *Jordan v. Indianapolis Water Co.* (Ind.) 61 N. E. 12.

(2) A court of equity will not decree specific performance of a contract that is not fair in all its provisions: *Snider v. Lehnherr*, 5 Or. 385, 390; *Hamilton v. Ryan*, 103 Ill. 212; *Washington v. Krutz*, 119 Fed. 280, 287; *Logansport Ry. Co. v. Logansport*, 114 Fed. 688.

(3) A promise made by one party without a corresponding obligation or promise by the other party is void: *Corbett v. Salem Gas Light Co.* 6 Or. 405 (25 Am. Rep. 541).

(4) There must be mutuality of remedies: *Norris v. Fox*, 45 Fed. 406; *Federal Oil Co. v. Western Oil Co.* 112 Fed. 373.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion of the court.

1. The contract or agreement forming the basis of this suit is of similar character to the one sued on in the case of *Livesley v. Johnston* (just decided), 45 Or. 30 (76 Pac. 946). There is one important difference, however, which relates to the acceptance of the hops. If of lesser quality than is

contracted for, Livesley & Co. have not here the option to purchase any amount. Another particular may be noted. There was here no consideration paid for the execution of the contract, as appears from the Johnston contract, and as alleged in the complaint in that case. Notwithstanding these differences, however, the same considerations of construction as to the binding effect of the contract upon the parties will apply here as in the Johnston Case, and it must be held to be valid and obligatory.

2. In the present case, in addition to the idea of a joint venture, as stated in the opinion in the Johnston Case, there is clear ground for equitable intervention to require specific performance to deliver the hops, which consists in the alleged fraudulent collusion of the parties defendant, entered into with a view on the part of A. Heise to avoid his obligations to plaintiffs under the contract.

The complaint being otherwise sufficient, the decree of the trial court will be reversed, the demurrer overruled, and the cause remanded for such further proceedings as may seem proper.

REVERSED.

Decided 27 June, 1904.

FIRE ASSOCIATION v. ALLESINA.

[77 Pac. 123.]

INSURANCE—VACATING A FRAUDULENT AWARD AT LAW.

1. An appraiser's award of a loss by fire cannot be impeached for fraud in a law action.

FILING EQUITABLE CROSS COMPLAINT—DEFENSE AT LAW.

2. Whenever a defendant sued at law is entitled to relief arising out of material facts cognizable only in equity, he may with his answer at law tender a cross-bill in equity, even though the answer may have contained a complete defense. In such cases the test is whether the legal defense is as adequate and complete as the one that may be afforded in equity: B. & C. Comp, § 391.

From Multnomah: JOHN B. CLELAND, Judge.

In 1903, the defendant, John Allesina, brought an action at law against the plaintiff, the Fire Association of Philadel-

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phia, a private corporation, to recover on a policy of insurance for \$2,000, covering loss or damage by fire to a stock of umbrellas and parasols belonging to him in the City of Portland. The complaint, after alleging the incorporation of the plaintiff and the issuance of the policy, averred that on the 28th of April, 1903, the property covered thereby was destroyed and damaged by fire; that at the time there was \$11,500 concurrent insurance thereon; that soon after the fire and within the time named in the policy Allesina made due proof of loss as required, but that, as he and the plaintiff were unable to agree as to the amount thereof, an agreement for an appraisement was entered into as provided in the policy, an appraiser duly selected by each of the parties, and an umpire thereafter chosen by the two appraisers; that the appraisers, with the assistance of the umpire, determined the amount of the loss and damage sustained by Allesina on account of the fire to be \$13,562.18; that the plaintiff company refused to pay its portion of the loss, and denied liability under its contract. The plaintiff answered the complaint, denying the validity of the policy and the amount of the loss, and for an affirmative defense alleging that the policy was void (1) because of a chattel mortgage on the property at the time it was issued, and (2) the fraud and false swearing of the assured after the loss. At the same time plaintiff filed a complaint in equity in the nature of a cross-bill to set aside and cancel the award. The bill alleges, in brief, that in and by the policy it is provided that the entire policy shall be void in case of fraud or false swearing by the assured concerning any matter regarding the property or the nature thereof; that after the fire the insurance company by its agent entered upon an investigation of the circumstances of the fire and the amount of the defendant's loss, with a view to determining, in accordance with the terms of the policy, the extent of its liability;

that for the purpose of such investigation the agent requested the defendant to furnish him all the information he possessed regarding the amount, kind, and quality of the goods insured and destroyed, together with his books, bills, invoices, and other vouchers; that there were lost and destroyed by the fire 3,351 umbrellas, 505 parasols, and other goods in stock, amounting in value in the aggregate not to exceed \$7,109.26, notwithstanding which the assured stated under oath, as part of his proof of loss, and on his examination in reference thereto, that the actual cash value of the property in the store at the time of the fire was between \$18,000 and \$19,000, and at various times during the investigation repeated such claims and demands; that for the purpose of inducing the company to believe his statements to be true he exhibited to it false and fraudulent inventories, and false entries in his books; that such statements, inventories, and entries were made and exhibited by the assured for the purpose of causing the company to believe the amount of the loss to be much greater than the true amount thereof; that by reason of such excessive claims the assured and the company were unable to agree as to the amount of the defendant's loss, and the company, because of its ignorance concerning such false and fraudulent claims and demands, was induced to enter into the agreement for submission to the appraisers; that by such submission it was agreed that the amount of the loss should be ascertained by Grant Phegley and H. R. Ramsdall, who should first select a competent and disinterested umpire to act with them in matters of difference only, and that the award of any two should be binding upon the parties: that the appraisers were unable to agree upon a mode of procedure, and referred the books and papers in their hands to the umpire, without having agreed upon any point, and without having made any investigation or

taken into consideration any evidence, except the sworn statement of the assured and his inventories, books, and invoices; that the appraisers explained their differences to the umpire and then withdrew, and thereupon the umpire, without hearing any evidence or making any investigation, excepting an inspection of the sworn statements and inventories of the assured, made and signed an award, which was subsequently agreed to by Phegley; that after the selection of Phegley as an appraiser, and before the award, the assured falsely and fraudulently stated and represented to him, without the knowledge, presence, or consent of the other appraiser, or the umpire, or of any representative of the company, that there were 810 parasols on hand in the store on January 1, 1903, that none of them had been sold since that date, but that all of them were lost and destroyed by the fire; that such statement was considered by Phegley and influenced his award, but plaintiff had no notice thereof, nor any opportunity to refute it; that the statements and alleged inventories of the assured were false and fraudulent, and were exhibited by the assured to the appraisers and umpire as evidence of the amount of his loss, with the purpose and intent thereby to cause them to make an award greatly in excess of his actual loss; that the appraisers and umpire were thereby deceived and misled, and based their award upon such false and fraudulent evidence; that the insurance company did not know, and could not with reasonable diligence until after the award was made have ascertained, that the statements and inventories so exhibited were false and fraudulent, but that, immediately after discovering such fraud, it notified the assured that it would not be bound by the award, or pay any sum whatever on account of the loss. On motion of the defendant the cross-bill was stricken out and the suit in equity dismissed. From this decree the insurance company appeals. REVERSED.

For appellant there was a brief over the names of *Veazie & Freeman* and *Wm. T. Muir*, with an oral argument by *Mr. J. Clarence Veazie* and *Mr. Muir*.

For respondent there was a brief and an oral argument by *Mr. Henry E. McGinn*.

MR. JUSTICE BEAN, after stating the facts in the preceding words, delivered the opinion of the court.

It is conceded that the cross-bill states facts sufficient to entitle the plaintiff in an independent suit to a decree setting aside and annulling the award of the appraisers selected by the company and the assured to determine the amount of the loss; but the contention is that, because the company answered in the law action brought against it by Allesina on the policy of insurance, setting up facts which, if true, would avoid the policy, it is not entitled to file a cross-bill to cancel the award.

1. There are two issues presented in the action at law: (1) The validity of the policy and the liability of the insurance company thereunder, and (2) the amount of the loss. The insurance company has a defense to the first at law, but as to the second it has no defense which it can make in the law action. The award of the appraisers cannot be impeached or set aside for fraud in a court of law: 1 Bigelow, *Fraud*, 96; 2 Story, *Equity* (13 ed.) § 1452; *Robertson v. Scottish Union Ins. Co.* (C. C.) 68 Fed. 173; *North British Ins. Co. v. Lathrop*, 70 Fed. 429 (17 C. C. A. 175).

2. The only remedy of the company, so far as the amount of the loss is concerned, is in equity, and we think it had a right to file a complaint in the law action in the nature of a cross-bill to set aside and annul the award, so that it might be permitted to litigate the amount of the loss, if it failed to establish its defense against the policy. The statute provides that in an action at law, if the defendant is entitled to relief arising out of facts requiring the inter-

position of a court of equity and material to his defense, he may, upon filing his answer therein, also file a complaint in equity in the nature of a cross-bill, which shall stay the proceedings at law, and the cause thereafter shall proceed as a suit in equity, in which the law action may be perpetually enjoined, or allowed to proceed in accordance with the final decree: B. & C. Comp. § 391. It is sometimes urged that the approved practice under the statute denies a defendant in a law action the right to file a cross-bill if his answer sets up a defense, even though he may be entitled to relief arising out of facts requiring the interposition of a court of equity and material to his defense. But we do not so interpret the provision of the statute authorizing a defendant in a law action to file a cross-bill. It was incorporated in the Code of Civil Procedure by the amendment of October 22, 1870 (Laws 1870, p. 30), and was thought necessary because the distinction between law and equity had been retained, so that a defendant in a law action could not assert an equitable defense, but, if entitled to relief in equity, was compelled to resort to an independent suit. The purpose of the amendment was to obviate this inconvenience, and to enable a defendant in a law action to make a defense, either entire or partial, not cognizable at law. The only condition to the exercise of the right is that he is entitled to relief arising out of facts requiring the interposition of a court of equity and material to his defense. The right to file a cross-bill is not made to depend upon whether he had a defense at law, but whether such defense is as full, complete, and adequate as that in equity. The law provides that upon filing his answer a defendant may, as plaintiff, file a complaint in equity in the nature of a cross-bill whenever he is entitled to relief arising out of facts requiring the interposition of a court of equity and material to his defense. He is thus obliged to answer in the law

action before he can file a cross-bill, and in so answering he may, we think, set up any defense that he may have. The mere filing of the answer will not deprive him of the benefit of the facts stated in the cross-bill, if they are otherwise sufficient to entitle him to relief in equity. The statute does not require him to file a statement that he has no defense at law, and such a pleading would not be an answer.

Section 73, B. & C. Comp., provides that the answer of the defendant shall contain: (1) A specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; (2) a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition. This statute was in force at the time of the amendatory act of 1870 giving a defendant in a law action the right to file a cross-bill, and it would seem logically to follow that the answer referred to in the act of 1870 means the ordinary answer required of a defendant and made legally necessary by the statute. Such an answer may tender upon its face a full or partial legal defense, but the cross-bill may show that there are facts necessary to a full and complete defense to the relief sought which require the interposition of a court of equity and which cannot be successfully invoked in the law action. In such case the defendant is entitled to relief in equity, and may file a complaint in that forum in the nature of a cross-bill. Under our system a defendant is entitled to set up as many defenses as he may have, and, if one of them is at law and another in equity, he may, if he sees proper, set his legal defense up by answer and at the same time file a complaint in equity in the nature of a cross-bill, setting forth his equitable defense, or he may depend alone upon his legal defense, and, if unsuccessful, resort to an original suit to

enforce his equitable rights: *Hill v. Cooper*, 6 Or. 181; *Spaur v. McBee*, 19 Or. 76 (23 Pac. 818); *McMahan v. Whelan*, 44 Or. 402 (75 Pac. 715). In most jurisdictions a defendant is entitled to plead in one answer all the defenses he may have, whether legal or equitable. With us, however, the distinction between law and equity prevails, and an equitable defense cannot be joined with a legal one. If, however, in a law action, a defendant is entitled to relief arising out of facts requiring the interposition of a court of equity and material to his defense, he may accomplish practically the same purpose by filing a complaint in equity in the nature of a cross-bill. When a proper equitable defense is filed, the action is immediately stayed or suspended until the suit in equity is disposed of, and it is then permitted to proceed, if at all, in accordance with the decree: *Finney v. Egan*, 43 Or. 1 (72 Pac. 136). The only other substantial difference between our practice and that of other states is that with us the action at law and the proceedings in equity must, for the purpose of trial, appeal, etc., be treated as distinct proceedings: *Oatman v. Epps*, 15 Or. 437 (15 Pac. 709); *Scheiffelin v. Weatherred*, 19 Or. 172 (23 Pac. 898). We are of the opinion, therefore, that the defendant in the law action of Allesina against the Fire Association was entitled to file its cross-bill for the purpose of canceling and annulling the award on the ground of fraud, in order that it might be permitted to litigate in the law action the issue as to the amount of the loss.

Nor do we think the previous decisions of this court are to the contrary. The act permitting a defendant in a law action to file a cross-bill was first noticed in *Dolph v. Barney*, 5 Or. 191. That was an action of ejectment. The defendant denied plaintiff's title and set up title in himself, at the same time filing a cross-bill, which was stricken

out on motion. The plaintiff had judgment in the law action, and the defendant appealed, assigning as one of the errors the striking out of the cross-bill. In the opinion of the court it is said that the motion was properly sustained, and that a "cross-bill can only be allowed when the answer does not set up a complete legal defense." In the light of subsequent decisions, the question now under discussion was not before the court, as the appeal was from the judgment in the law action, which did not bring up for review the order striking the cross-bill from the files. Such was the decision in *Oatman v. Epps*, 15 Or. 437 (15 Pac. 709), and *Scheiffelin v. Weatherred*, 19 Or. 172 (23 Pac. 898). *Oatman v. Epps* was an action in ejectment. The defendant answered, denying plaintiff's title, and also filed a complaint in equity in the nature of a cross-bill. A demurrer to the cross-bill was sustained, and the complaint dismissed. The law action was then tried, resulting in a judgment for the plaintiff, and the defendant appealed. It was held that the order sustaining the demurrer and dismissing the cross-bill could not be reviewed upon an appeal from the judgment in the law action, Mr. Justice THAYER, speaking for the court, saying: "But an examination of the Code will show that when such complaint is filed it stays the proceedings at law, and the case thereafter proceeds as a suit in equity, in which said proceedings at law may be perpetually enjoined by final decree or allowed to proceed in accordance with such final decree. The effect of filing such a complaint is the commencement of a suit in equity, which subordinates the proceeding at law until the relief arising out of the facts requiring the interposition of a court of equity, and material to the defense of the action at law, is obtained." It will be noted that in this case the answer filed by the defendant in the law action set up a complete defense, but, notwithstanding this, Mr. Justice THAYER says: "A tech-

nical view in such cases serves no purpose, except to deny a party justice, or, at least impress him with a belief that he has been unfairly dealt by. It would have been much more in consonance with equity in this case to have retained the complaint filed by the appellant and ascertained whether or not the allegations contained therein were true. If they were true, the appellant was clearly entitled to relief. It would have been a denial of justice to hold otherwise. If the fact of Jane Epps not being a party to the litigation interfered with or embarrassed the adjudication of the rights of the parties, the court should have required that she be brought in and made a party. Equity is no narrow, cramped affair. It is expansive in its nature, and adapts itself to all manner of complications."

Hatcher v. Briggs, 6 Or. 31, was also an action in ejectment. Defendant answered at law, at the same time filing a cross-bill, which on the trial in equity was dismissed and the law action allowed to proceed. On the appeal taken from this decree, the court discusses at some length the proper construction of the section of the statute allowing a defendant in a law action to file a cross-bill, and the proper practice thereunder, concluding that the relief sought by the cross-bill may be either complete or partial, defensive or affirmative, and that the cases in other jurisdictions, where the distinction between actions at law and suits in equity has been abolished, may without impropriety be regarded as authority in determining the right of a defendant to file a cross-bill under our statute and the sufficiency of such pleading. *Hill v. Cooper*, 6 Or. 181, was a suit for the specific performance of an imperfect deed. Cooper had previously sued Hill in ejectment to recover possession of the property described therein. Hill had set up a defense to the legal title, and the case had gone against him. Cooper pleaded the judgment in the law action as a bar to the suit in equity, but the court held that

the fact that Hill had relied upon his legal defense did not debar him from afterwards demanding equitable relief in an independent suit. In the course of the opinion, by way of argument, the dictum in *Dolph v. Barney*, 5 Or. 191, is referred to with approval, although it was not necessary to a decision therein. The same may be said of *Scheland v. Erpelding*, 6 Or. 258, which was an action in *assumpsit* for the recovery of wages. The defendant denied liability, and for an affirmative defense alleged that plaintiff was not an employé of his, but that he and the plaintiff were partners, and at the same time filed a complaint in equity for a dissolution of the alleged partnership and for an accounting. The plaintiff answered the cross-bill, and the court held that, although a motion to strike out ought to have been sustained, he had by answering waived his right to insist upon the motion, and the suit was properly heard and determined as an original suit in equity. The matter set up in the cross-bill in this case was in no way material to the defense of the law action, and therefore could not properly have been entertained under our statute; hence the allusion to the rule in *Dolph v. Barney* could not give added force to the statement or make it authority. The action was on an account; the defense that the parties were partners, which was a good and complete defense at law. The condition of the partnership account, if they were partners, or whether the partnership should be dissolved, were matters wholly irrelevant to the law action, and in no way material to a defense therein.

South Port. Land Co. v. Munger, 36 Or. 457 (54 Pac. 815, 60 Pac. 5), is the latest and most thorough consideration of the right of a defendant in a law action to file a cross-bill. This was an action of ejectment. The answer denied the plaintiff's title, and pleaded title in the defendant by adverse possession. The defendant filed a cross-bill, making the plaintiff and other parties defendants, for the pur-

pose of obtaining a decree curing a defect in one of the deeds in the chain of his record title. A motion and demurrer to the cross-bill were overruled, and the defendant answered. The court, speaking through Mr. Justice WOLVERTON, held, on authority of *Scheland v. Erpelding*, 6 Or. 258, that the motion and demurrer were waived by answering over; but the objection that the question was jurisdictional and could not be waived, because the defendant had a good defense at law, was considered at length, and the conclusion reached that the practice inaugurated by the statute authorizing a defendant in a law action to file a cross-bill and the remedy afforded thereby are "as broad as that which may be invoked by original bill, permitting even the use of such facts as constitute a partial defense only to the cause of action. * * By statutory intendment, therefore, the defendant in the law action is afforded such relief, either defensive or affirmative, entire or partial, as he would be able to insist upon in a court of equity, and, if the facts are such as to invoke equitable cognizance, the action at law may be stayed until the equities are disposed of in the appropriate forum. The remedy at law to which the statute alludes must be plain, adequate, and complete, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. It is not enough that there is a remedy at law."

We conclude, therefore, that the previous opinions of the court, when construed with reference to the subject-matter of the litigation and the question actually under consideration, are not in conflict with, but, on the contrary, tend to support, the doctrine that whenever a defendant in a law action is entitled to relief, either partial or entire, defensive or affirmative, arising out of facts requiring the interposition of a court of equity and material to his defense, he may, upon filing his answer, also as

plaintiff file a complaint in the nature of a cross-bill, which shall stay the proceedings at law until the issues presented by the cross-bill are disposed of. And it is no objection to such cross-bill that the defendant may have set up in his answer in the law action a defense to the action as full and complete as he may have in that forum; the vital question being whether the law defense is as adequate and complete as that in equity.

It is argued in this case, however, that the matters alleged in the cross-bill are also set up as a defense to the law action, and, if true, would defeat the policy, and therefore there is no need of a resort to equity to avoid the award. As we read the cross-bill, however, it sets up three grounds for avoiding the award: (1) Fraud in obtaining the agreement of submission, and false and fraudulent inventories, statements, books, and testimony submitted by the assured to the company and the arbitrators; (2) the misconduct of the assured and one of the arbitrators in privately discussing the merits of the case; and (3) that the award was made by the umpire and the appraiser without hearing any evidence or obtaining any information as to the amount of the loss, except the inspection of the false inventories, books, accounts, and statements of the assured. The first of these grounds is also set up as a defense in the law action, and, if true, would, under the terms of the contract of insurance, avoid the policy. The other two, however, are not pleaded in the law action, and would not constitute a defense therein, so that the cross-bill sets up two grounds for avoiding the award that are not presented and could not be litigated in the law action.

We are of the opinion, therefore, that the motion to strike out the cross-bill was improperly sustained, and that the decree of the court dismissing the bill must be reversed, and the cause remanded for such further proceeding as may be proper, not inconsistent with this opinion.

REVERSED.

Decided 20 June, 1904.

WRIGHT v. LYONS.

[77 Pac. 81.]

MINES—SUFFICIENT MARKING OF BOUNDARIES.

1. In marking a mining location under Sections 3975 and 3976, B. & C. Comp., a failure to place monuments at the center ends of the ground claimed is a fatal omission, as is a neglect to attach to the recorded copy of the location notice an affidavit that the required improvement work has been done.

MARKING LOCATIONS—CONFLICT OF STATE AND FEDERAL LAWS.

2. Sections 3975 and 3976, B. & C. Comp., requiring locators of a lode claim to establish the center end posts or monuments of the claim in a particular manner, and to attach to the copy of notice of location filed with the clerk of the county wherein the claim is situated an affidavit of proof of the work required to be done by section 3977, as conditions precedent to the establishment of a valid claim, are not in conflict with Section 2324, Rev. Stat. U. S., requiring that the location of a claim shall be distinctly marked on the ground, since the latter section does not specify how the marking shall be done, while the former supplies the omitted information.

From Malheur: MORTON D. CLIFFORD, Judge.

Action of ejectment by George Wright and others against C. B. Lyons and others to recover possession of a mining claim. According to the complaint filed in this cause, George Wright and R. M. Turner, being citizens of the United States, and above the age of twenty-one years, on September 3, 1901, entered and discovered upon the public domain a quartz ledge or lode of mineral-bearing rock in place, and located a claim thereon, being 1,450 feet along the lode by 300 feet on each side, by conspicuously posting a notice of such location at the point of discovery, and causing the same to be staked and marked upon the ground as follows:

“One stake at point of discovery with said notice of location posted thereon. One stake on the northwest corner, one stake on the northeast corner, one stake on the southeast corner, and one stake on the southwest corner of said quartz claim, each and all of said stakes being four inches in diameter, four feet high above the ground, blazed inside with the words ‘Geo. Wright. Blue Bucket,’ written on the blazed portion of each of said stakes, and each and all of said stakes intended to designate the point of dis-

covery and each of the four corners, respectively, of the said 'Blue Bucket' quartz claim; each and all of the said stakes being in conspicuous places and in plain view of the traveling public, and designated the corners of said claim so that the boundaries thereof could be readily traced."

Thereafter they caused to be sunk upon and along the lode an open cut, six feet deep, four feet wide, and ten feet in length from the point of discovery, and on September 30th caused a notice, without having attached thereto an affidavit in proof of the work required to be done by Section 3977, B. & C. Comp., to be duly recorded in the office of the county clerk for Malheur County, in Book B of Record of Quartz Locations, at page 134; the claim being designated as the "Blue Bucket Quartz Claim." Plaintiffs have succeeded to the interest and title of Wright and Turner, and, having been ousted, as they allege, by defendants, demand judgment for a recovery of possession. A demurrer was interposed to the complaint and sustained, and, judgment having been rendered dismissing the action, plaintiffs appeal. The case was submitted on briefs under the proviso of Rule 16: 35 Or. 587, 600.

AFFIRMED.

For appellants there was a brief over the names of *William Miller* and *Will R. King*.

For respondents there was a brief over the name of *John L. Rand*.

MR. JUSTICE WOLVERTON, after stating the facts in the preceding words, delivered the opinion of the court.

Plaintiffs have by their complaint herein set out in detail the manner of locating the claim in dispute, with a view of determining the entire controversy upon the demurrer. Passing the contention made that the record does not contain a sufficient description with reference to some

natural object or permanent monument to identify it definitely and distinctly, as required by Rev. Stat. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426), we will inquire touching the validity of the location and recording of the claim under the provisions of our own statute, and whether such statute is inimical to the laws and regulations of the United States relative to the same subject.

1. Section 3975, B. & C. Comp., provides that a quartz claim shall be located by posting on the vein or lode discovered a notice of such discovery and location, indicating, among other requirements, the general course or strike of the vein or lode, as nearly as may be, with reference to some natural object or permanent monument in the vicinity, and by defining the boundaries upon the surface so that the same may be readily traced. It further provides that such boundaries shall, within thirty days after the posting of notice, be marked by six substantial posts, projecting not less than three feet above the surface of the ground, and not less than four inches square or in diameter, or by substantial mounds of stone, or earth and stone, at least two feet in height; that is to say, one of such posts or mounds of rock shall be established at each corner and one at each center end of the claim. Section 3976 provides that such locator shall, within sixty days from and after posting the location notice, file for record with the recorder of conveyances, if there be one, who shall be the custodian of mining records and miners' liens, otherwise with the clerk of the county wherein said claim is situated, a copy of such notice, having attached thereto an affidavit showing that the work required to be done by section 3977 has been performed, and that no location notice shall be entitled to record until the work so required shall have been done, and the affidavit in proof thereof attached. Section 3977 provides that before the expiration of sixty days from the date of the posting of the notice of discov-

ery, and before recording the notice of location as required by the preceding section, the locator must sink a discovery shaft upon the claim located, to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary, to show by such work a lode or vein of mineral deposit in place, and that a cut or crosscut or tunnel which cuts the lode at a depth of ten feet, or an open cut at least six feet deep, four feet wide, and ten feet in length along the lode from the point where the same may be in any manner discovered, shall be equivalent to such discovery shaft, and, further, that the locator, or some one for him, who did work upon, and has knowledge of the facts relating to the sinking of, the discovery shaft, shall make and attach to the copy of the notice of location to be recorded an affidavit showing compliance by the locator with the provisions of this section, which affidavit shall be recorded with such copy of the location notice. These sections of the statute are made very specific, and it was intended, no doubt, that the locator, in order to acquire a right or initiate a title to a mining claim, should comply with them, at least in substance.

It is plain in the present instance that Wright and Turner did not mark the boundaries of the claim in the manner prescribed, in that they omitted to establish the center end posts or monuments, and, further, that they did not cause to be attached to the copy of notice of location delivered to the clerk for record an affidavit in proof of the work required to be done under section 3977, and none such was recorded. These omissions we deem fatal to the valid initiation of their title. All these requirements pertain to the location of the claim, and, unless observed in their substance, there can be no location. No right or title in the public domain can be acquired without such observance. "The right to the possession," says Mr. Chief Justice WAITE in *Belk v. Meagher*, 104 U. S.

279, 284, "comes only from a valid location. Consequently, if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations." Citing this case with many others, Mr. Lindley, in his valuable work on Mines (volume 1, 2d ed. § 329), states the principle concisely as follows: "A substantial compliance with the requirements of the laws, federal and state, as well as local rules, where they exist and are not repugnant to state or federal legislation, is a condition precedent to the completion of a valid location." To the same purpose, see *Patterson v. Tarbell*, 26 Or. 29 (37 Pac. 76); *Horswell v. Ruiz*, 67 Cal. 111 (7 Pac. 197); *Noyes v. Black*, 4 Mont. 527 (2 Pac. 769); *Book v. Justice Min. Co.* (C. C.) 58 Fed. 106. As the locators have not complied in substance with the statutory prerequisites, they did not acquire a valid right of possession or initiatory title to the mine, such as will afford their successors in interest or the plaintiffs herein a basis for an action in ejectment.

2. It is insisted, however, that these provisions of the state law are repugnant to the statute of the United States relative to the location of lode claims, and therefore that the locators are not bound to observe them, and may acquire and have acquired a valid location by an observance of the United States regulations only. All public lands in which mineral deposits are found are declared by the federal statute to be open for occupation and purchase under regulations prescribed by law, and according to the local customs and rules of miners in the several mining districts, so far as the same are applicable and are not inconsistent with the laws of the United States. Locators, so long as they comply with the laws of the United

States, and with the state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, are given the exclusive right of possession and enjoyment; and miners of each mining district are authorized to make regulations not in conflict with the federal statutes or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, and amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground, so that its boundaries may be readily traced; all records of such a claim must contain the name or names of the locators, the date of the location, and such a description of the claim, by reference to some natural object or permanent monument, as will identify it; and, after location, certain annual work is to be performed until patent issues: Rev. Stat. U. S. §§ 2319, 2322, 2324 (U. S. Comp. St. 1901, pp. 1424-1426). The very terms of these requirements permit state and local laws and rules regulating the location of mining claims, the only limitation prescribed being that they shall not conflict with the paramount law providing for disposal of the public mineral domain to purchasers.

One of the fundamental requisites is that the claim shall be distinctly marked on the ground, but how, the statute does not attempt to define, the manner of the marking being left to the regulations of the state or the mining district in which the mine is located; and all reasonable regulations looking to that end are certainly within the compass of the federal law. So with reference to the recording of the claim. The record must at least substantially accord with the United States statutory requirements, but there is here left scope for state and district regulations, and a reasonable amount of development work may be required, so as to expose the lode, render

certain the discovery, and indicate the good faith of the locator; and, as evidence of such compliance, proof may be required that the work has been done. Such regulations are not deemed to be repugnant to the federal statute, and are therefore valid and binding upon the locator, if he would secure a good location: 1 Lindley, Mines (2 ed.) §§ 249, 250; *Erhart v. Boaro*, 113 U. S. 527 (5 Sup. Ct. 560); *Kendall v. San Juan Min. Co.* 144 U. S. 658 (12 Sup. Ct. 779); *Northmore v. Simmons*, 97 Fed. 386 (38 C. C. A. 211); *O'Donnell v. Glenn*, 8 Mont. 248 (19 Pac. 302); *O'Donnell v. Glenn*, 9 Mont. 452 (23 Pac. 1018, 8 L. R. A. 629); *Metcalf v. Prescott*, 10 Mont. 283 (25 Pac. 1037); *McCowan v. Maclay*, 16 Mont. 234 (40 Pac. 602); *Sissons v. Sommers*, 24 Nev. 579 (55 Pac. 829, 77 Am. St. Rep. 815); *Beals v. Cone*, 27 Colo. 473 (62 Pac. 948, 83 Am. St. Rep. 92). We are clearly of the opinion that the requirements of our statute complained of by plaintiffs are reasonable and within the scope and purpose of the United States statute. Such regulations are therefore valid, and, the plaintiffs' predecessors not having complied with them in the particulars hereinbefore designated, the demurrer to the complaint was properly sustained.

It follows that the judgment of the trial court must be affirmed, and it is so ordered. AFFIRMED.

Decided 20 June, 1904.

ADCOCK v. OREGON RAILROAD CO.

[77 Pac. 78.]

PERSONAL INJURY — ALLEGATIONS AND PROOFS — NERVOUS SHOCK.

1. Under a general allegation of damages recovery cannot be had for injuries resulting from fright or nervous shock, those not being the usual or necessary effects of a physical injury.

PERSONAL INJURY — EVIDENCE OF NERVOUS CONDITION AFTERWARDS.

2. In an action for personal injuries, in which no injury to the nervous system was alleged, and counsel disclaimed any intention of showing such injury as an item of damage, evidence that plaintiff had been nervous since the acci-

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dent was not objectional as relating to an element of damage not claimed by the complaint, but is competent as tending to show her general manner and condition.

PERSONAL INJURY—INFERENCE FROM SUBSEQUENT CONDITION.

3. In an action for personal injuries, in which it appears that plaintiff was strong and robust before the accident, and had been nervous since, an inference that the nervousness was the result of the physical injury was justified.

POWER OF COURT TO REQUIRE REMITTITUR OF PART OF VERDICT.*

4. In an action for personal injuries, the court has power to order a remission of a part of the damages awarded by the verdict, as a condition of overruling a motion for a new trial.

POWER TO REMIT PART OF PREJUDICED OR PASSIONATE VERDICT.

5. Where it clearly appears that the jury in a damage action were influenced by passion or prejudice, the error cannot be cured by remitting a part of the verdict, but a new trial must be granted.

PRESUMPTION ON APPEAL AS TO RULINGS OF TRIAL COURT.

6. Where, in an action for personal injuries, defendant's motion for a new trial was based on a claim of excessive damages, appearing to have been given under the influence of passion and prejudice, and also upon the insufficiency of the evidence to justify the verdict, it must be presumed on appeal that an order requiring a remittitur of part of the damages assessed as a condition to denying the motion for a new trial was entered partly because of the insufficiency of the evidence, and not because the verdict was the result of passion and prejudice.

ORDER REFUSING NEW TRIAL NOT APPEALABLE.

7. An order of the trial court allowing or overruling a motion for a new trial is not assignable as error on appeal.

This is an action by Elizabeth Adcock (formerly Dozier) against the Oregon Railroad and Navigation Company to recover damages for an injury to the plaintiff caused by the collision of a cook car upon which she was working with one of defendant's cars. The complaint alleges that by such collision she "was violently thrown against the side of the said cook car, * * and was thereby greatly injured and bruised in and upon the head and in and upon the right side and hip of her, the said Elizabeth Dozier, the plaintiff herein, and her right arm was then and there burned and scalded, so that the said Elizabeth Dozier thereby became sick and unable to work, and suf-

* NOTE.—On this subject see 26 L. R. A. 384, for note on Power of Appellate Court to Interfere with Verdict Because of Excessive Damages, citing a large number of cases. See, also, notes in 26 Am. St. Rep. 541, 29 Am. St. Rep. 149, 81 Am. St. Rep. 215, and 67 L. R. A. 495.

In 47 L. R. A. 83 is an extended note: Inadequacy of Damages as a Ground for Setting Aside a Verdict.

ferred great bodily pain and anguish, and was confined to her bed and room for a period of about three weeks, and was permanently injured in the use of her left eye and right leg, and is unable, by reason thereof, to use her said left leg and right arm as prior to said injury, and her eyesight has been thereby greatly impaired, to the damage of the plaintiff three thousand dollars (\$3,000)." The answer denies the negligence alleged, and, for affirmative defense, avers that the injury to the plaintiff was due to the negligence of a fellow-servant and to her own contributory negligence. At the beginning of the trial, however, the attorneys for the defendant stated to the court and jury that it admitted its negligence, and that plaintiff was not guilty of contributory negligence, and therefore the only issue upon which plaintiff would be required to present proof would be as to the extent of her injuries and the amount of her damages. The jury returned a verdict in favor of the plaintiff, assessing her damages at \$1,650. The defendant moved to set aside the verdict and for a new trial on the ground (1) of excessive damages, appearing to have been given under the influence of passion or prejudice; (2) insufficiency of the evidence to justify the verdict; and (3) error in law occurring at the trial. Upon the hearing of the motion, the court was of the opinion that the verdict was excessive, and should not have been for a larger sum than \$825, but, upon a remittitur by plaintiff of one half of the verdict, the motion was overruled, and judgment entered in her favor for that amount and the costs of the action. From this judgment the defendant appeals, assigning error in the admission of testimony and in overruling the motion for a new trial.

AFFIRMED.

For appellant there was a brief over the names of *William W. Cotton, Carter & Raley*, and *James G. Wilson*, with an oral argument by *Mr. Cotton*.

For respondent there was a brief over the names of *Henry E. Collier*, *John J. Balleray*, and *John McCourt*, with an oral argument by *Mr. Balleray*.

MR. JUSTICE BEAN, after stating the facts in the foregoing terms, delivered the opinion of the court.

The plaintiff gave evidence tending to show that before the accident she was a strong, healthy, and robust woman; that she was injured upon the head, had one arm scalded, and was hurt upon the shoulder, hip, and knee; that she was removed to a neighboring house and confined to her bed for about three weeks; that thereafter she was removed to her daughter-in-law's house, in Nolin, and for a number of weeks was unable to do anything, but had to be assisted in dressing; that she was weak and became tired and exhausted easily; that she complained of her side, back, knee, and arm; that at the time of the accident her name was Dozier, but she was married about two months thereafter to her present husband, Adcock. Her son John Dozier was called as a witness on her behalf, and testified, over the objection and exception of defendant, among other things, as follows: "Q. What has been your mother's condition as to being nervous? A. She complains of being very nervous at times. Q. Can't you observe, yourself? A. Yes, sir; I can notice a great difference. Q. What is her condition? A. I can't say exactly what her conditions are. I am not a physician and am unable to say." Thereupon plaintiff's counsel, by leave of the court, propounded to the witness the following leading question: "Ever since that accident, has she been nervous?" and the witness answered: "Yes, sir." Dr. McFaul, a practicing physician, testified that he examined the plaintiff at his office some time prior to July 7, 1903, and thereupon, over the objection and exception of the defendant, was asked and answered the following ques-

tions: "Q. What was her condition as to her nervousness? A. She was suffering considerably. I couldn't tell particularly about the nervous conditions. She was suffering apparently considerably at the time. Q. Doctor, what is the probable result—I mean to the nervous system—of a sudden jar or jolt from a collision of a railroad train?" Objection was made to this question on the ground that the testimony called for was immaterial and at variance with the allegations of the complaint, when counsel for plaintiff stated that in asking questions he disclaimed any right to damages for, or intent to prove, any injury to the brain or nervous system of the plaintiff, or any psychic or mental disturbance, and withdrew the last question propounded to the witness.

1. It is argued that the testimony in reference to plaintiff's being nervous after the accident, was incompetent, under the allegations of the complaint, because not alleged as a matter of special damages. A general allegation of damages will let in evidence of such damages as are the natural and necessary result of the injury complained of, but, if the plaintiff seeks to recover damages not so connected with the injury alleged, he must plead them. Where a plaintiff alleges that his person has been injured, and proves the allegation, the law implies damages, and he may recover such as necessarily and immediately follow from the injury, under a general allegation that damages were sustained. If he seeks, however, to recover damages for consequences which do not necessarily and immediately arise from the injury alleged, he must aver the special damages which he seeks to recover. Under an allegation of a physical injury, therefore, the plaintiff cannot recover damages for an injury resulting from fright or a mere nervous shock: *Maynard v. Oregon Railroad Co.* 43 Or.

63 (72 Pac. 590); *Kleiner v. Third Avenue R. Co.* 162 N. Y. 193 (56 N. E. 497).

2. The evidence objected to, however, was not offered or admitted, as we understand the record, for the purpose of proving damages for an injury to the nervous system of the plaintiff, but merely as proof of one of the manifestations of the physical injury complained of. The evidence was that ever since the accident the plaintiff had been "nervous," without any particular indication as to what was meant by the term. The word "nervous" is a generic term, having many different meanings, and it is manifest from the disclaimer of counsel of an intention to show injury to the nervous system as an item of damage that, as employed in the questions and answers, it simply means that the plaintiff was excitable and easily agitated or annoyed, as a result of her physical injury, not that she was suffering from a nervous disease caused by the accident. There was no attempt to prove injury to the nervous system, or that plaintiff was suffering from any nervous derangement, and therefore we do not think the rule invoked by counsel is applicable to the case in hand.

3. It is urged that plaintiff failed to show that the nervousness referred to by the witness resulted from the accident. The law is that damages recoverable for an injury are limited to its natural and probable consequences, and in such case the question always is whether there is sufficient connection between the wrongful act and the injury. It is not sought, however, to prove plaintiff's nervousness as a ground of damages. It is shown that she was a strong, robust woman prior to the accident, and ever since that time has been nervous, inferentially indicating at least that her nervousness was the result of the physical injury sustained at the time.

4. It is next contended that the court had no power or authority to overrule defendant's motion for a new trial

on condition that plaintiff remit one half of the damages assessed by the verdict. The power of the court to require the entry of a remittitur in an action to recover damages for a tort, as a condition to overruling a motion for a new trial, has sometimes been denied, but according to the weight of authority the power exists, unless it is apparent that the verdict was the result of passion and prejudice. In the early case of *Blunt v. Little*, 3 Mason, 102 (Fed. Cas. No. 1,578), which was an action to recover damages for a malicious prosecution, Mr. Justice STORY said that when it clearly appears that the jury have committed a grave error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is the duty of the court to interfere and prevent the wrong, and that the case before him would be submitted to another jury unless the plaintiff remitted a part of the damages assessed by the jury. The remission was made, and a new trial refused. In *Doyle v. Dixon*, 97 Mass. 208 (93 Am. Dec. 80), the jury rendered a verdict in favor of the plaintiff for \$800. On the hearing of a motion to set aside the verdict for excess of damages and as contrary to the weight of the evidence, the court was of opinion that the verdict was excessive, but, in consequence of the plaintiff's offer to remit one half thereof, ordered it to stand. Upon appeal the ruling was affirmed, Mr. Justice GRAY saying: "The defendant has no ground of exception to the action of the superior court upon the motion for a new trial. Such a motion, so far as it depends upon the weight of evidence or other matter of fact, is exclusively addressed to the discretion of the presiding judge. When the damages awarded by the jury appear to the judge to be excessive, he may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, or a portion thereof, and order the verdict to stand for the residue. The judge in this case having adopted the latter course,

and ordered the verdict to stand for the sum of four hundred dollars, the only question of law arising thereon is whether the law would warrant a verdict for this amount."

In *Northern Pac. R. v. Herbert*, 116 U. S. 642 (6 Sup. Ct. 590), which was a personal injury action, the plaintiff recovered a verdict for \$25,000. The court overruled a motion for a new trial on condition that plaintiff should remit \$15,000 of the verdict, and upon appeal the judgment was affirmed. The doctrine of this case was challenged in the subsequent case of *Arkansas Cattle Co. v. Mann*, 130 U. S. 69 (9 Sup. Ct. 458), and the court asked to reëxamine the question in the light of the authorities. It did so, and, as a result of its examination, says: "The practice which this court approved in *Northern Pacific Railroad v. Herbert* is sustained by sound reason, and does not in any just sense impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. But in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give him any cause for complaint. Notwithstanding such remission, it is still open to him to show, in the court which tried the case, that the plaintiff was not entitled to a verdict in any sum, and to insist, either in that court or

in the appellate court, that such errors of law were committed as entitled him to have a new trial of the whole case." To the same effect are numerous authorities collected in 18 Enc. Pl. & Pr. 125; 3 Sedgwick, Dam. (8 ed.) § 1322; 2 Sutherland, Dam. (3 ed.) § 459. We are clear, therefore, that it is within the power of a trial court, as a condition to overruling a motion for a new trial, to require the entry of a remittitur of a part of the verdict in an action of tort, when, in its opinion, the verdict is excessive.

5. It is contended, however, that in this case the court could not have required the plaintiff to remit one half of the verdict in her favor, except upon the theory that the jury were influenced by passion and prejudice. If such had been the view entertained by the court, the proper practice would undoubtedly have been to grant a new trial, as the part of the verdict allowed to stand would have been as much tainted by passion and prejudice as that which was remitted. Where the damages assessed are excessive, in the opinion of the trial court, or not justified by the evidence, the error may in many cases be obviated by remitting the excess; but, where it clearly appears that the jury were influenced by passion or prejudice, the error cannot be cured by merely remitting a part of the verdict, but it must be entirely rejected, since the effect is to cast suspicion on the conduct of the jury and their entire finding: *Stafford v. Pawtucket Haircloth Co.* 2 Cliff. 82 (Fed. Cas. No. 13,275); *Loewenthal v. Streng*, 90 Ill. 74; *Chicago & N. W. R. Co. v. Cummings*, 20 Ill. App. 333; *Steinbuechel v. Wright*, 43 Kan. 307 (23 Pac. 560).

6. But we cannot assume in this case, from the mere fact that the court required a remittitur of half the amount of damages assessed by the jury, as a condition to denying the motion for a new trial, that it believed that the verdict was the result of passion and prejudice. There is no find-

ing to that effect. The recital in the order is that it appeared to the court that the damages assessed were excessive. The motion for a new trial was based on the ground of excessive damages, appearing to have been given under the influence of passion and prejudice, and also upon the insufficiency of the evidence to justify the verdict; and it may have been, and we must assume was, allowed in part for the latter reason.

7. Moreover, an order of a trial court allowing or refusing a motion for a new trial is not assignable as error, under the practice in this State: *Kearney v. Snodgrass*, 12 Or. 311 (7 Pac. 309); *Beekman v. Hamlin*, 23 Or. 313 (31 Pac. 707). And it is therefore at least doubtful whether a party against whom a verdict has been rendered can assign as error on appeal the overruling of his motion for a new trial on condition that his adversary will remit a part thereof in his favor: 18 Enc. Pl. & Pr. 130. There being no error in the record, the judgment is affirmed. **AFFIRMED.**

Decided 13 June, rehearing denied 5 July, 1904.

ALTSCHUL v. CASEY.

[76 Pac. 1083.]

EVIDENCE OF CORPORATE EXISTENCE.

1. Where it appears in an action of ejectment that the United States conveyed land by patent to a company as a corporation, that the State had donated land to the same patentee as a body corporate, and that the patentee assumed to convey the lands in a corporate capacity, its legal identity as a corporation is *prima facie* established, rendering admissible for plaintiff, who claimed under the corporation, a deed purporting to have been executed by the corporation.

PRESUMPTION OF AUTHORITY OF CORPORATE GRANTOR.

2. The authority of a corporate grantor to execute a deed is presumptively established after a lapse of more than thirty years, where it appears on the face of the deed that the corporation caused it to be executed, and the deed was subsequently litigated, and its validity recognized.

SIGNATURES TO DEED BY CORPORATION.

3. A deed purporting to be a conveyance by a named corporation is sufficiently executed where the president and secretary sign it on behalf of the corporate body.

EXECUTION OF CORPORATE DEED — SEAL.

4. The use by the recorder of deeds of the letters "L. S." is a sufficient representation of the seal of a corporate grantor in a recorded deed, and presumptively the corporate seal was on the original.

CONSTRUCTION OF TERMS OF TRUST DEED.

5. Where one is appointed trustee of real estate, the legal title of which is conveyed to him by the owner by an instrument limiting his power to convey to such persons only, and at the time and in the manner the *cestuis que trustent* may designate, the provision is for the benefit of the *cestuis que trustent*, and can be waived.

WAIVER OF LIMITATION IN TRUST DEED.

6. Where a trust deed is executed by the owners of real estate, who convey the title thereof to a trustee, limiting the power of the trustee to convey only to such persons and at the time and in the manner the *cestuis que trustent* may designate, the conduct of the *cestuis que trustent* conveying to one of their number, and that one and the trustee joining in a conveyance of the land to plaintiff, amounts to a waiver of the condition in the deed.

EJECTMENT — PROOF OF TITLE BY RESPECTIVE PARTIES.

7. In ejectment plaintiff need prove only an apparently good title to prevail over simple denials; and if the defendant relies affirmatively on any title he must allege and prove it.

PRESUMPTION FROM LONG CONTINUED CONDUCT.

8. Where all the owners of a tract of land subsequent to the time of the execution of a deed purporting to have been signed by the heirs of a former owner, have acted in reference to such property as though the deed had been signed by every heir, it will be presumed after a lapse of twenty years that the signers were all the heirs of such former owner.

SIGNATURES TO DEED — IDEM SONANS.

9. The fact that the heirs of a man named Clark signed as Clarke a deed to property inherited from him is a mere unimportant irregularity in the chain of title.

EJECTMENT — SUPERIORITY OF TITLE IS JURY QUESTION.

10. Where plaintiff in an action of ejectment set up a paper title, and established a *prima facie* case, and defendant claimed title by adverse possession, and offered proof in support of it, the question of the superiority of their respective rights was for the jury, under proper instructions as to the effect of the documentary evidence.

IRREGULAR DEED.

11. In an action of ejectment in which plaintiff claimed title to the land in controversy by legal conveyances, a deed to the property by one through whom plaintiff claimed, purporting to pass the title to a corporation not a party to the record, offered by defendant to show that plaintiff could not be the owner, is entitled to no weight as evidence, where it appears that the deed has been litigated, and declared to be a fraud on the grantor, as having been executed by an attorney in fact of the grantor without the requisite authority.

From Crook: W. L. BRADSHAW, Judge.

Action by Charles Altschul against William T. Casey relative to the ownership of real property, the plaintiff claiming through legal conveyances from the general gov-

ernment, and the defendant by adverse possession. The trial resulted in a verdict and judgment for the plaintiff, and the defendant appeals. AFFIRMED.

For appellant there was a brief over the name of *Huntington & Wilson*, with an oral argument by *Mr. Bela S. Huntington*.

For respondent there was a brief over the name of *Williams, Wood & Linthicum*, with an oral argument by *Mr. Chas. E. S. Wood*.

Mr. Justice WOLVERTON delivered the opinion.

After introducing a patent from the United States to the Willamette Valley & Cascade Mountain Wagon Road Company, plaintiff introduced a deed from the company to H. K. W. Clark, with reference to which two questions arose: *first*, whether it was admissible without showing *aliunde* that the company was an incorporation; and, *second*, whether it was legally executed. It purports on its face to be an indenture "between the Willamette Valley and Cascade Mountain Wagon Road Company, a body corporate under the laws of the State of Oregon, party of the first part, and H. K. W. Clark, * * party of the second part;" is signed "Luther Elkins, President of the Willamette Valley and Cascade Mountain Wagon Road Company," and "James Elkins, Secretary of said Company," the letters "L. S." appearing beneath these signatures; and was "sealed and delivered in presence of" Eli Carter and Jas. L. Cowan. The notary before whom the same was acknowledged certifies that the officers signing executed the instrument for and on behalf of said company for the uses and purposes mentioned.

1. Answering the first objection, it must be conceded that a corporation must have a legal existence, and be capable of taking a conveyance, otherwise a deed purporting to convey land to it will be a nullity. But when we

turn back to the patent we find that the legislature of the State has recognized the road company as capable of taking, because it has, by an act approved October 24, 1866, donated lands to the company, and the United States government has so recognized it by conveying to it by patent. These things, coupled with the fact that the company assumed to convey the same lands as and in the capacity of a body corporate under the laws of the State of Oregon, are enough, *prima facie* at least, to establish its legal entity as a corporation, if it were necessary otherwise to prove it after the deed has itself recited the fact.

2. As to the grantor's authority to execute, we agree with counsel for the respondent that the fact that it appears upon the face of the deed that the corporation caused it to be executed, which deed has since been recognized as valid (*Cahn v. Barnes* [C. C.] 7 Sawy. 48, 5 Fed. 326), is sufficient, after a lapse of more than thirty years, to establish presumptively the requisite authority thereto.

3. The second objection is fully answered by the case of *Moore v. Willamette T. & L. Co.* 7 Or. 359, the facts of which are almost identical with those developed here.

4. The one signal exception is that what is claimed to be the corporate seal here is indicated by the letters, "L. S." while in that case it is written out "Seal of Corporation." It will be noted that the instrument was proven in this case by the record of deeds, not by a production of the original. In a similar instance it was said in *Holbrook v. Nichol*, 36 Ill. 161, 164: "Inasmuch as the impression of the device of the seal cannot be transferred from the instrument to which it is affixed to the record by the officer making the record, it is only necessary that he should, in some appropriate mode, indicate that a seal was affixed to the certificate. And when the letters 'L. S.' the word 'Seal,' or a scroll is employed for that purpose, no reason is perceived why it is not sufficient. It is not to be ex-

pected that the officer making the record of the original instrument can make a facsimile of the impression of the seal. So that, where the seal on the original is indicated on the record or a copy in the manner we have specified, it must be held to answer the requirements of the law." See, also, *Bucklen v. Hasterlik*, 155 Ill. 423 (40 N. E. 561). In the light of these authorities, when the position of the seal with relation to the signatures of the officers executing is considered, we may well assume that it was intended to indicate the seal of the corporation, so that the fact of the recording officers' indication of the corporate seal by the letters "L. S." does not in reality differentiate or distinguish this case from that of *Moore v. Willamette T. & L. Co.* 7 Or. 359, and the deed must be held to have been in form legally executed. It was therefore properly admitted in evidence.

5. The next deed in the chain of plaintiff's title is from H. K. W. Clark to David Cahn, executed September 1, 1871. It recites a consideration of \$1.00, and conveys, among others, the premises in dispute. It further recites:

"The property hereby granted was delivered unto the party of the first part by and through a deed of conveyance dated August 19, A. D. 1871, executed and delivered by the said Willamette Valley and Cascade Mountain Wagon Road Company to the said party of the first part [being the deed heretofore in this opinion discussed]. But this conveyance is nevertheless made to the said party of the second part only upon the express trust that he the said party of the second part shall and will hold all the property hereby granted to the use of T. Egenton Hogg, Alexander Weill, and the said party of the first part, and that he will sell, mortgage, convey, or otherwise dispose of said property or any part thereof to and only to such person or persons, party or parties, corporation or corporations and at such and only such time or times and in such and only in such manner and upon such terms as the said T. Egenton Hogg, Alexander Weill, and the said party of the

first part, or in case of the death of any of the last named parties then as the survivor or survivors of said three parties and the executors or administrators of the deceased party or parties, but not the heirs or legatees of either, shall in writing, such writing to be by them severally subscribed and duly acknowledged, name and appoint and determine, and in case of any sale or sales or other disposition of said property or of any part thereof shall and will at once apply the proceeds arising from such sale or other disposition so far as shall be necessary to the payment of the money advances that have heretofore been made by the said Weill and the said party of the first part in the purchase of said property, the amount of which said advances have been determined by the parties and are specifically set forth in a written agreement executed between the said Hogg, Weill and the said party of the first part, which agreement is of even date herewith, and to the payment of such further or additional money advances as the said Weill and the party of the first part may hereafter make pursuant to the terms of the said written agreement, and the interest that shall have accrued upon any and all advances according to the provisions of said agreement and, after the payment of all said advances and interest, shall and will pay all the balances of the proceeds of the sale or sales or other disposition of said property if any such balance there shall be unto the said Hogg, Weill, and party of the first part, their heirs, executors, administrators, and assigns in the proportion of their respective interests therein, determined and declared in said written agreement, and shall and will convey all of said property that shall then remain undisposed unto the three parties last aforesaid according to the provisions of said written agreement, a copy of which agreement is placed with this instrument in the hands of the said party of the second part for his information.

“And this conveyance is made upon the further trust that the said party of the second part shall and will at any time when so requested in writing by the said party of the first part and the said Weill and Hogg, such writing to be executed and acknowledged by them severally, appoint and make such one or more of the parties making

the request or such other person or persons as shall be named therein his attorney in fact to sell and convey said land or such parts thereof as shall remain unsold at the time of such "appointment."

Following this is a deed from Sarah M. Clarke, widow of H. K. W. Clark, deceased, to Alexander Weill, of date April 9, 1879, conveying to him all her right, title, and interest in the lands conveyed by H. K. W. Clark to Cahn in trust for Weill, Hogg, and Clark; a deed from Fred K. W. Clarke, of same date, to Alexander Weill, conveying all his interest in the land; a deed bearing date February 18, 1879, from T. Egerton Hogg to Alexander Weill, of all his right, title, and interest in the grant; a power of attorney of date May 13, 1884, from Alexander Weill and wife to David Cahn and Eugene Meyer, authorizing them, either jointly or severally, to sell and convey their interest in the grant; and a deed of date March 31, 1893, from David Cahn and wife and Alexander Weill and wife by Eugene Meyer, their attorney in fact, to Charles Altschul, the plaintiff.

It is objected that this record is insufficient to vest the legal title of the premises in dispute in the plaintiff, and that it was error in the court to instruct the jury that it had that effect; the principal reasons urged being that the deed from Clark to Cahn conveyed a mere naked legal title, and that by the terms thereof it was made a condition precedent to Cahn's disposing of the property that he should first have the authority thereto of the *cestuis que trustent*, executed in the manner designated, and, no such consent having been shown, no title passed from Cahn. Cahn had more than a naked power. He had the legal title, which he held in trust for Weill, Hogg, and Clark, but no other interest. The sole equitable title was in Weill, Hogg, and Clark, and manifestly it was to protect them that the clause was inserted in the deed by which Cahn covenanted

to sell only to such persons and at the time and in the manner that they might name, appoint, or designate. It may be admitted, we think, that Cahn could not make a conveyance, so as to carry the title without such assent, manifested in the manner designated; but it seems clear that the *cestuis que trustent*, for whose benefit the stipulation is contained in the trust deed, could waive the condition either expressly or by implication.

6. When they had, by apt conveyances, parted with all their interest in the subject of the trust, what more can be urged indicating such a waiver? Mrs. Clark, the widow of H. K. W. Clark, and Fred K. W. Clark, first conveyed all their interest to Weill, one of the *cestuis que trustent*, and then Hogg likewise conveyed to Weill; thus divesting themselves of all right, title, interest, power, or control over the property, leaving Weill as the sole remaining *cestui que trust*. Subsequently Weill and Cahn joined in a deed to the plaintiff. Thus all parties connected with the trust affair, so far as it was within their power, by deed or conveyance divested themselves of every right or interest they had or possessed in the entire subject of the trust. Suppose that the trustee and *cestuis que trustent* had on the day following the execution and delivery of the trust deed all joined in one deed to some third party, thus disregarding the stipulation touching the direction of the *cestuis que trustent*, could it be said that such a deed would not be effective to convey a valid title? Who could lay any objection to it, or deny its absolute validity? Certainly not the trustee, as he would have joined with the *cestuis que trustent* in conveying. Nor with any greater reason could the *cestuis que trustent* object, as, by joining with the trustee, they, if not expressly, would have by the strongest kind of implication, authorized the conveyance, and thus have waived their right to insist upon Cahn's covenant in that regard. Neither of

these parties could question the title thus conveyed, and none other could question it, as no one else would have had any interest in the property. Now, is it any more objectionable that all the other *cestuis que trustent* have conveyed to one of their number, who, having thus acquired their entire interest, has joined with the trustee and conveyed to the plaintiff? The effect in either case would manifestly be the same. The grantee's title would be such that none of the parties to the transfer could question it, and, if good against them, they together having formerly been invested with the whole title, it would be good against every other person, including the defendant.

7. It may be stated in this relation that it is not indispensable that the plaintiff in an action of ejectment should show a perfect indefeasible estate in fee simple to authorize a recovery against one who can establish no legal right in property or in possession. It is sufficient that he shows *prima facie* a good title; that is, one that is apparently good. It is true that the defendant, so to speak, may fold his arms, and await the establishment of plaintiff's title, since the burden of proof is upon the latter, but he cannot defeat the plaintiff's title by showing title in another or in himself unless he plead it. If, however, he sets up such title in another or in himself, he assumes the burden of proving it, as the plaintiff is required to prove his title, and it is not incumbent upon plaintiff negatively to establish the nonexistence thereof, but he may stand upon his *prima facie* case, if he so desires, and, if it proves to be the better title, he will prevail: Tyler, Eject. 74; 10 Am. Eng. & Enc. Law (2 ed.) 481, 532; *Moore v. Willamette T. & L. Co.* 7 Or. 359; *Phillippi v. Thompson*, 8 Or. 428; *Greenleaf v. Birth*, 31 U. S. (6 Pet.) 302; *Zeringue v. Williams*, 15 La. Ann. 76; *Parkersburg Industrial Co. v.*

Schultz, 43 W. Va. 470 (27 S. E. 255); *Lewis v. Goguette*, 3 Stew. & P. 184.

In this connection objection is made that Cahn had no power or authority to substitute another to convey in his name. But the contingency is provided for in the deed.

8. There is also another objection—that no proof was offered showing that Mrs. Clark and Fred K. W. Clark were the sole heirs of H. K. W. Clark, deceased. As to this we are in some doubt, but when we come to consider that all the parties to the record have subsequently treated and dealt with the title as though no other was interested therein, we think it may be fairly presumed that all the heirs have parted with what title they possessed.

9. That Mrs. Clark and Fred K. W. Clark appear to have written their names “Clarke” is clearly not an irregularity that will defeat the conveyance: *Newell, Eject.* 586.

10. We are impressed that the patent and deeds noticed in this opinion were sufficient *prima facie* to vest the legal title in the plaintiff. Nor did the trial court err in so instructing the jury. The defendant set up title in himself by adverse possession, and offered much proof to establish it. The court instructed fully as to his contention, and, having done so, the instruction as to the effect of the patent and deeds should be read in connection with it, and the jury must have so understood it.

11. Another objection should be noticed. The defendant offered in evidence a deed from Weill to the Willamette Valley & Coast Railroad Company, incorporating a contract between Hogg and Weill, awarding the former an option for two years to purchase the wagon road grant, through which it is claimed that the title to the property became vested in the Willamette Valley & Coast Railroad Company, and hence that plaintiff could not be the owner. These instruments are of no legal consequence, however, as they have been declared void, and the pretended deed

a fraud upon Weill, having been executed by Hogg as his attorney in fact, but without the requisite authority. See *Altschul v. Hogg*, (C. C.) 62 Fed. 539.

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

Decided 20 June, 1904.

MILLER v. HEAD CAMP.

[77 Pac. 83.]

FINDINGS AS SUPPORT FOR JUDGMENT—BILL OF EXCEPTIONS.

1. In the absence of a bill of exceptions the appellate court can consider only whether the findings support the judgment.

EFFECT OF ADMISSIONS IN PLEADINGS.

2. Admissions in the pleadings amount to findings of fact as to the matters admitted.

WAIVER OF TERMS OF INSURANCE POLICY—ESTOPPEL.

3. A waiver of a right necessarily involves on the part of the active power a knowledge of the right waived and of the facts relating to the matter: for instance, a premium or assessment on an insurance certificate having been remitted while the insured was suspended, and received at the head office after his death, the head officer, not being aware of his illness or death, cannot be said to have waived the suspension by keeping the assessment for a few weeks.

FACTS NOT CONSTITUTING A WAIVER.

4. Defendant benefit society declared assessments during October and November, 1898, payable during the month following such levy. Insured never paid such assessments, and became ill January 10, 1899, and died on January 18th. Two days prior to his death the clerk of the local lodge, without knowledge that insured was seriously ill, issued receipts for such assessments, dating them as of January 5th, and sent the sums due therefor to defendant, without insured having certified that he was in good health. Proof of death was submitted to defendant April 5th, but it did not return the money so received until July 21st. The certificate provided that it should not be in force at any time when the member should be suspended from the order, and that, if he should not pay any assessment within the time prescribed, his certificate would become void, and so continue until he was reinstated, though a suspended member might be reinstated by making application within three months, certifying good health. *Held*, that it was error to hold that there was a waiver of forfeiture, as a matter of law, as the defendant's general agent did not know of insured's illness and death.

From Harney: MORTON D. CLIFFORD, Judge.

This is an action by Sarah C. Miller against the Head Camp, Pacific Jurisdiction, Woodmen of the World—a corporation organized on the lodge plan, as a benefit society, under the laws of Colorado—to recover the sum of

\$1,000 on a certificate of mutual life insurance issued by it to her son, F. T. Miller, and in which she is named as the beneficiary. Miller died January 18, 1899, having been a member of Harney Valley Camp, No. 381, a subordinate lodge at Burns, Oregon; and, the defendant refusing to pay any part of the sum specified in the certificate, this action was instituted, the complaint being in the usual form. The defense is based on the ground that Miller died suspended from the order. The reply having alleged that a forfeiture of his membership was waived by the defendant, a trial was had by the court, without the intervention of a jury, and findings of fact and conclusions of law were made, upon which judgment was entered for the plaintiff in the sum demanded, and the defendant appeals.

REVERSED.

For appellant there was a brief over the name of *C. M. Campbell*, and *Stillman, Leedy & Pierce*, with an oral argument by *Mr. A. D. Stillman*.

For respondent there was a brief over the name of *Biggs & Biggs*, with an oral argument by *Mr. Dalton Biggs*.

MR. CHIEF JUSTICE MOORE, after stating the facts in the foregoing terms, delivered the opinion of the court.

1. There being no bill of exceptions, the only question involved is whether the findings of fact support the judgment: *Noland v. Bull*, 24 Or. 479 (33 Pac. 983); *Allen v. Leavens*, 26 Or. 164 (37 Pac. 488, 26 L. R. A. 620, 46 Am. St. Rep. 613); *Richardson v. Dunlap*, 26 Or. 270 (38 Pac. 1).

The court found, in effect, that the defendant is a corporation, as alleged; that it issued to F. T. Miller a certificate in which its by-laws were referred to as a part thereof; that in October and November, 1898, the defendant duly declared assessments on all its members on account of death losses, which were payable during the month next

following such levy; that these assessments were never paid by Miller, who became ill with la grippe January 10, 1899, which four days thereafter developed into polioencephalitis, followed by mental confusion, delirium, and coma, resulting in his death on the 18th of that month; that two days prior thereto one J. J. Tupker, who was then clerk of Harney Valley Camp, No. 381, issued receipts for such assessments, dating them as of the 5th of that month, and at the same time sent to the defendant the sums due therefor, which were received by it without Miller's having certified that he was in good health; that, though proof of Miller's death was submitted to the defendant April 5, 1899, it did not return the money so received until July 21st of that year; that Tupker was the duly authorized agent of the plaintiff and of the defendant; that he never made any misrepresentations to it; that the defendant accepted the payment of such assessments without any conditions or qualifications; that its officers had a right to waive, and, by the retention of the money paid by Tupker, did waive, a forfeiture, and treated Miller as in good standing at the time the remittance was made; and that Tupker did not then know of Miller's serious illness. Based on such findings the court concluded, as a matter of law, that the defendant waived a forfeiture of Miller's certificate; that Miller was a member in good standing in the defendant's order at the time of his death; and that plaintiff, as his beneficiary, was entitled to a judgment against the defendant for the sum of \$1,000.

In addition to the findings made by the court, the pleadings admit that Miller's certificate provided that it should not be in force at any time when he should be suspended from the order; that, if he should not pay any assessment levied against him within the time prescribed, his certificate would become void, and so continue until

he should be duly reinstated; that a suspended member, within three months after his suspension, might be reinstated by making application therefor, certifying his bodily health to be good, and agreeing that, should his death occur within one year thereafter, as a result of any disease which he might then have, none of his beneficiaries should be entitled to receive any benefits on that account; that with such application he should pay the clerk of his camp all arrearages for assessments and camp dues; that, when the camp clerk sent remittance sheets to the head auditor on account of such payment, he should accompany the same with the reinstatement application, and, if he failed in this respect, such payments should be returned; that no attempted reinstatement by the clerk of a camp, without such reinstatement application, should be effective or entitle his beneficiaries to receive any benefit.

2. The facts admitted by the pleadings are tantamount to findings duly made: *Fink v. Canyon Road Co.* 5 Or. 301; *Luse v. Isthmus Transit Ry. Co.* 6 Or. 125 (25 Am. Rep. 506). But as they are only evidentiary, and do not necessarily support the judgment, they are stated merely to show the method prescribed for the reinstatement of a suspended member.

3. Do the findings of fact made by the court show that the defendant waived its right to insist upon a forfeiture of Miller's membership in the order in consequence of his nonpayment of assessments? A waiver is an intentional relinquishment of a known right, implying an election to forego some advantage which one might, at his option, have insisted upon, and, to be effective as an estoppel, there must be, first, a knowledge of an existence of the right; and, second, an intention to relinquish it: *Murray v. Heinze*, 17 Mont. 353 (42 Pac. 1057, 43 Pac. 714); *Supreme Lodge v. Quinn*, 78 Miss. 525 (29 South. 826). Mr. Justice BEAN, in *Whigham v. Independent Foresters*, 44 Or.

543 (75 Pac. 1067), in discussing this subject, says: "In the nature of things, there can be no waiver or estoppel without knowledge of the facts upon which it is based. The waiver of a right presupposes a knowledge of the right waived, and, therefore, before defendant can be held to be estopped or to have waived any of its rights by reason of the conduct of a subordinate lodge or its officers, it must be shown that it or they had knowledge of the facts."

In the case at bar the court found that the money sent by Tupker was received by the defendant six days after Miller's death. The defendant's general agent must have known that Miller was in default at that time, but evidently did not know of his death, which fixed and determined the rights and obligations of the parties to this action; *Stringham v. Mutual Ins. Co.* 44 Or. 447 (75 Pac. 822). And as this agent was ignorant of Miller's illness, a waiver of forfeiture cannot be inferred from the acceptance and retention of the money in the absence of such knowledge. If the court had found the ultimate fact that the defendant's officers waived a forfeiture and continued to treat Miller as in good standing January 16, 1899, the decision upon the question of fact would probably have been sufficient; but the finding made is equivalent to a conclusion of law, based as it is upon the receipt and retention of the money, and, without further finding that the defendant's officers knew of Miller's ill health, is insufficient.

4. Though the clauses of the constitution and by-laws admitted by the pleadings seem to negative the right of a subordinate camp clerk to waive a forfeiture, the finding of the court that Tupker was the agent of the defendant cannot, in the absence of a bill of exceptions, be controverted, and it must therefore be assumed that evidence was introduced in support thereof. It will be remembered

that the court found that on January 16, 1899, when Tupker remitted the assessments to the defendant, he did not know of Miller's "serious" illness. This implies that he knew Miller's health was impaired, but did not know his life was endangered. If the court had found that Tupker, as defendant's agent, waived a forfeiture, such finding, in the condition of the transcript before us, would probably have been sufficient; but the waiver upon which the court's conclusion of law seems to be based consists of the acts of the defendant's officers, and does not, in our opinion, refer to Tupker as its agent. These officers had no knowledge of Miller's illness, and, as there is no finding that Tupker waived a forfeiture, his implied knowledge of Miller's impaired health at the time he paid the assessments for him is not a sufficient finding to uphold the judgment, which is reversed, and a new trial ordered.

REVERSED.

Decided 27 June, rehearing denied 3 October, 1904.

THOMPSON v. PURDY.

[77 Pac. 118.]

MISCONDUCT OF COUNSEL—CURING ERROR.*

1. Improper remarks of counsel during a trial, promptly disapproved by the judge, and not afterward continued, do not constitute reversible error, it appearing quite certainly that no prejudice resulted.

PROPER LIMITS OF CROSS-EXAMINATION.

2. In the development of matters brought out on direct examination, the practice is to permit such questions as tend to bring out the whole truth concerning them.

INSTRUCTION AS TO EFFECT OF ORAL EVIDENCE.

3. Where, after charging on the general features of the case, the court gave the statutory injunctions touching the effect of evidence prescribed by B. & C. Comp. § 857, and in so doing charged that oral admissions and declarations of parties should be received with caution, "but that evidence of oral admissions and oral contracts, when proven declarations of parties, constitute very strong testimony," such instruction was not erroneous as in effect charging that evidence of oral contracts should be received with caution.

* NOTE.—See, also, *State v. McDaniel*, 39 Or. 106.—REPORTER.

HARMLESS ERROR.

4. Where the verdict rendered was below the amount actually due on the basis of 6 per cent interest, an instruction permitting the allowance of 8 per cent on a part of the debt which had accrued prior to the enactment of Laws 1898, p. 15, reducing the rate to 6 per cent, if error, was harmless.

From Washington: THOMAS A. McBRIDE, Judge.

Suit by T. W. Thompson against B. F. Purdy. Plaintiff and defendant by their joint notes, three in number, borrowed \$4,000 for the use and benefit of the Gaston Coöperative Milling Company, and plaintiff, being compelled to pay the amount due, sued the defendant for contribution. The defendant answered that after the payment of the first note, he having theretofore advanced certain sums of money to the milling company, it was agreed between him and the plaintiff that he would continue to make advances to said company as they were needed until the total amount thereof should equal the said sum of \$4,000, and that thereafter the plaintiff should pay the remaining two notes, and release defendant from any claim for contribution arising on account of his having to pay such joint obligations; that the defendant complied with the agreement on his part, and made the stipulated advances, exceeding said sum of \$4,000. The sole issue at the trial was upon the answer, and, judgment having been given and rendered for plaintiff, defendant appeals. The case was submitted on briefs under the proviso of Rule 16 of the supreme court: 35 Or. 587, 600. APPEALED.

For appellant there was a brief by *Mr. Samuel B. Huston*.

For respondent there was a brief by *Mr. Julius C. Moreland*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion of the court.

1. The bill of exceptions shows that defendant gave evidence in his own behalf tending to support the agreement

set out in his answer, and that he had complied on his part by making the stipulated advances to the milling company. On cross-examination plaintiff's counsel produced the books of the concern, and interrogated the witness with reference to certain entries made therein. Among other things, he was asked if he had not continued as president and manager of the concern until he put it into bankruptcy. Answering an objection made to the question, counsel for plaintiff stated that the witness acted as president and manager, ran the business, paid himself, and then carried it on, "and milked it till it was dry." These remarks, on motion of opposing counsel, were stricken out by the court, and the jury directed to disregard them. Without being answered, the question was superseded by another. Later on, while another witness was under examination, plaintiff's counsel again remarked, "I would like to bring out all the facts concerning this matter, but counsel is afraid of them." This language was also stricken out. The first error is predicated upon these several remarks of counsel as being calculated to prejudice the minds of the jury unfavorably to defendant. The objectionable tactics of counsel were not further persisted in, and, in view of the prompt action of the court, on its attention being called to the matter in each instance, in directing the jury to disregard the exceptional remarks, thereby giving it the stamp of its positive disapproval, it is hardly possible that defendant's cause could have been affected adversely. The alleged error cannot, therefore, be maintained.

2. While the defendant was still undergoing cross-examination, plaintiff's counsel, over objection as immaterial and irrelevant, further inquired: "This agreement with Thompson was to borrow the money and complete the mill, wasn't it?" to which he answered, "Yes, sir; it was for the purpose of putting the mill in operation." The examina-

tion appears to be relevant to the agreement relied on by defendant in his answer, and was proper cross-examination, being germane to the matter elicited in chief.

Another exception relates to the cross-examination of E. H. Jeter, who was secretary and bookkeeper of the milling company, also a stockholder and member of its board of directors. He was asked, "Who was treasurer of this concern?" to which he was permitted to answer, "Not having the record, I cannot state positively whether it was Mr. Hibbs or Mr. Raymonds." He further testified: "When persons came in to pay their bills, if Mr. Purdy was there and settled with them, he took the money. If Mr. Purdy wasn't there, I usually received the money." All this was responsive to a general inquiry as to the manner in which the business of the company was transacted. The witness had explained without objection that sometimes the company had money and sometimes it had not. If it had no money in the bank, or not sufficient, and if a farmer wanted to sell his wheat, Purdy "backed it." At times he had checks given to him by various parties. Sometimes he would turn these over, and at other times give his individual check for the difference, or give cash. The purpose of the inquiry seems to have been to sift defendant's account for advances which he claims to have made the company in pursuance of his alleged agreement, and it is not perceived in what respect it was not a perfectly legitimate inquiry. The purpose of cross-examination is to arrive at the truth, and when, under the exercise of a liberal discretion of the trial court, the witness speaks within the legitimate compass of the examination in chief, there can arise no pertinent exception.

3. In the course of its instructions the court said to the jury: "Oral admissions and declarations of parties should be received with caution, remembering the liability of the human mind to err in remembering the statements and

declarations of parties. When the declaration of a party is brought in, we should cautiously receive it. Evidence of oral admissions and oral contracts, when proven, declarations of parties, constitute very strong testimony, of course. There can't be anything stronger when they are established." In saving an exception to this language, counsel said: "The court instructed, with reference to oral statements or contracts of parties, that they should be received with caution. I know that is the rule in reference to admissions, but I don't think that is the rule in reference to oral contracts." And the court replied, in the presence of the jury, "I think declarations of this character should be cautiously received." Error is assigned in this relation. What the court meant is not far to seek. After charging upon the general features of the case, the court was giving the statutory injunctions touching the effect of evidence (B. & C. Comp. § 857), as that they were the sole judges of the facts; that they were not bound to find in conformity with the declarations of any number of witnesses whose evidence did not satisfy the mind as against a less number; that every witness is presumed to speak the truth until discredited; that a witness shown to be false in one part of his testimony should be distrusted in others; that evidence is to be estimated not only by its intrinsic weight, but also by the evidence which it is apparently within the power of one side to produce and the other to contradict, etc.; and, lastly, that the admissions and declarations of the parties should be received with caution. As explanatory, the court further said: "When the declaration of a party is brought in, we should cautiously receive it. Evidence of oral declarations and oral contracts, declarations of parties, constitute very strong evidence, of course. There can't be anything stronger when they are established." The matter was further developed when counsel made his objection. But there was

certainly no attempt on the part of the court to instruct that evidence of oral contracts should be received with caution. If there were oral admissions and declarations shown to have been made with reference to such contract or otherwise, those the court enjoined the jury to receive with caution, but not, as we interpret the instructions, to receive with caution the evidence touching the oral contract itself. It is not clear from the bill of exceptions what admissions and declarations were shown in the course of the trial, and the relevancy of the instructions is not, therefore, entirely manifest, so that no error is disclosed by the record in the particular complained of.

4. The next assignment of error is with reference to the instruction of the court whereby the jury were directed, if they found for plaintiff, to allow 8 per cent interest on the first two notes, they having been paid by plaintiff before the act of the legislature reducing the legal rate of interest to 6 per cent per annum went into effect: Laws 1898, p. 15. But whether this be error or not, it is, in any event, harmless, as a careful computation of the notes at the rate of 6 per cent only will show that the verdict is below the amount actually due upon that basis.

AFFIRMED.

Decided 8 October, 1904.

ON MOTION FOR REHEARING.

MR. JUSTICE WOLVERTON delivered the opinion.

In a petition for a rehearing counsel for appellant challenges the correctness of this court's holding in three particulars. As to the first two, it seems to us, after all, that the argument now advanced is but an elaboration upon that contained in the brief submitting the cause, and we see no reason for receding from the determination originally reached.

As to the third, it is submitted that the verdict is in excess of the judgment prayed for in the complaint, a question now made for the first time. This is true, if interest be computed at the rate of 6 per cent per annum. The pleader has made some mistakes, but, taking into account the allegations of the complaint, it will be found that the computation at 6 per cent exceeds the verdict. The prayer demands interest, however, at the rate of 8 per cent per annum, which if added to the principal sums named will exceed the verdict, hence it becomes apparent that the verdict is not in excess of the judgment prayed for in the complaint, in any view that might be taken as to the rate of interest recoverable, consequently there is no error in the former conclusion.

REHEARING DENIED.

Decided 20 June, rehearing denied 8 October 1904.

EASTERN OREGON LAND CO. v. ANDREWS.

[77 Pac. 117.]

45	203
48	263

PUBLIC LANDS — PRIMA FACIE EVIDENCE OF LOCATION OF GRANT.

1. On an issue as to the exterior limits of a land grant a certified copy of a diagram from the office of the Secretary of the Interior, showing the primary limits of the grant, establishes *prima facie* the limits as so shown, as it comes from an office the chief official of which was charged by law with the duty of adjusting the grant, and appears on its face to have been made with reference to proper legal subdivisions.

IDEM.

2. On an issue as to the exterior limits of a wagon road land grant, the *prima facie* case made by the production of a diagram from the office of the Secretary of the Interior, showing the primary limits of the grant, is not overcome by introducing a plat from the office of the Secretary of the State in which the land is situated, certified by the Governor as correctly showing the location of the road, and the testimony of a surveyor that the land in question was outside the limits of the grant as measured from the line of construction shown on the state map, for no law required the filing of any map with any state official, nor does it appear that such map was the basis of the adjustment of the grant by the United States.

EVIDENCE DISPUTING GOVERNMENT PATENT.

3. A government patent is presumptive evidence that the land department of the United States had authority to issue it and that such power was rightfully exercised, and to overcome this presumption clear and convincing proof is required.

From Sherman: W. L. BRADSHAW, Judge.

Action of ejectment by the Eastern Oregon Land Company against William G. Andrews. The case comes here on a cross-bill in equity, so treated by stipulation of the parties, although in form an answer interposed as a defense to an action in ejectment instituted by the above plaintiff against defendant to recover the possession of the northwest quarter of the southwest quarter, otherwise described as lot 3, and the east half of the southwest quarter of section 7, township 1 north, range 17 east of the Willamette Meridian. The plaintiff claims title through grant by the general government by act of Congress approved February 25, 1867 (14 Stat. U. S. 409, c. 77), to The Dalles Military Wagon Road Company. The land lies within the limits of the old Northern Pacific Railroad grant, which was afterward forfeited by act of Congress approved September 29, 1890 (26 Stat. U. S. 496, c. 1040, U. S. Comp. St. 1901, p. 1598); and the defendant claims to have acquired the equitable title thereto through settlement by invitation and license of the Northern Pacific Railroad Company, and continuation of such settlement and purchase from the general government in pursuance of the forfeiture act and acts supplementary thereto. He alleges that, after due and regular proof of settlement, he being qualified thereto, and the payment of all legal and necessary fees, including the purchase price required by law, the Register and Receiver of the local Land Office at The Dalles, Oregon, on December 22, 1896, duly issued to him a final cash receipt and certificate for the land; that thereafter the Secretary of the Interior, without warrant or authority of law, canceled the same; and that the United States still holds the purchase money and fees so paid. He further alleges that he has since 1886 been in the quiet, peaceable, and lawful possession of said premises,

and that since the issuance to him of said final certificate he has been and now is the equitable owner and entitled to the possession; that said premises are entirely outside of and beyond the limits of the company's grant, and for that reason a patent to the company under which plaintiff claims is void and without legal effect, in so far as it pertains thereto. The defendant being successful in the trial court, the plaintiff appeals. REVERSED.

For appellant there was a brief over the name of *Huntington & Wilson*, with an oral argument by *Mr. Bela S. Huntington*.

For respondent there was a brief over the name of *Moore & Gavin*, with an oral argument by *Mr. James F. Moore*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion of the court.

To support his cross-bill, the defendant introduced in evidence, over objection, a certified copy of the original map and plat of The Dalles Military Wagon Road, embraced within townships 1 and 2 south, ranges 16 and 17 east, of the Willamette Meridian, on file in the office of the Secretary of State at Salem, Oregon. The accompanying certificates show the original to have been calculated and platted from the field notes of the survey made by D. P. Thompson, the surveyor for the road company, certified to by him June 8, 1869, among which is one by George L. Woods, Governor of the State, attested by the Secretary, showing that the plat had been duly filed in his office, and that the road had been built and completed in all respects as required by the act of Congress and by the act of the Legislative Assembly of the State of Oregon, approved October 20, 1868, and that the same had been accepted. The road is indicated on this map by two lines, in the main parallel, although at some points they seem

to diverge, and at others to converge, so that the distance between them is not altogether uniform. Where it passes the land in dispute, the government survey sectionizing the public lands is indicated, showing the location of the road with reference thereto. A. W. Mohr, a civil engineer, being called on behalf of defendant, produced a map, which he testifies is an enlargement twelve times according to scale of the certified map from the Secretary of State's office, indicating the location of the land in dispute with reference to the line of the road. Upon this map appear produced tangential curves, three miles distant from points on the road nearest to the land. One set of curves is extended from points designated on the northerly margin, and another set from points at the center of the road. Those extended from the margin touch the southwest corner of the fractional southwest quarter of section 7; one cutting the corner squarely, and the other standing inside perhaps a tenth of a mile, but neither of them touching the land in dispute. Those extended from the center of the road, however, do not reach section 7 at any point. Mohr further testifies that the margin of the road is fifteen chains distant from the center, and that the road is thirty chains wide at the points designated. This map was also allowed to go in evidence over objections. Defendant then produced and introduced in evidence a certified diagram from the Department of the Interior, showing the primary limits of the wagon road grant as it affects the premises in question. This diagram shows the southwest quarter of section 7 to be within the adjusted primary limits of the grant; the adjustment appearing to have been made with reference to the smallest legal subdivisions of the government survey. Other testimony adduced, showing the settlement of defendant upon the land, his continuous residence thereon, the payment by him of the regular fees, including the purchase

price as required by law, the issuance to him of the final cash certificate therefor, and the subsequent cancellation thereof by direction of the Secretary of the Interior; and, finally, a certified copy of the United States patent No. 10, to The Dalles Military Wagon Road Company, was introduced, which comprises the disputed premises. Such, for all practical purposes, is the case made for defendant, and the especial and signal contention of counsel is that the land in controversy lies beyond the limits of the wagon road grant, and that, although patent has issued to that company, the defendant, by reason of his settlement and the payment of the purchase price to the general government, has become the owner in equity, and by reason thereof is entitled to have the patent declared void as it affects the defendant, and he decreed to be entitled to hold the legal title.

1. By the act of Congress of February 25, 1867 (14 Stat. U. S. 409, c. 77), there was granted to the State of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia River, by way of Camp Watson, Cañon City, and Mormon or Humboldt Basin, to a point on Snake River opposite Fort Boise, in Idaho Territory, alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road, which act also authorized the State, with a view to subserving the purposes of the grant, to dispose of such lands. Section 3 of the act prescribed that the road should be constructed with such width, gradation, and bridges as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may direct; and section 6 directed the Surveyor General for the District of Oregon to cause the lands to be surveyed when the State should have enacted the necessary legislation to carry the act into effect. By an act of the Legislative Assembly of the State of

Oregon, approved October 20, 1868, all such lands, rights, and privileges accruing to the State by reason of such act of Congress were donated to The Dalles Military Road Company: Laws 1868, page 3. By a later act of Congress, approved June 18, 1874 (18 Stat. U. S. 80, c. 305, U. S. Comp. St. 1901, p. 1517), Congress authorized the issuance of patents for such lands where the road has been shown by the certificate of the Governor of the State to have been constructed and completed as in the original grant provided. The Surveyor General has, of course, made the contemplated survey of the public lands along the course of the located road as it passes the premises demanded, as no map could otherwise have been made of the primary limits of the grant; and the diagram certified to by the Acting Commissioner of the General Land Office must be taken *prima facie* to indicate correctly the exterior limits thereof. How the adjustment of the grant was made does not appear. Presumably it was by the Secretary of the Interior, whose duty it was to make all such adjustments with relation to the public domain and to administer the grant; and, manifestly, from an inspection of the diagram, it was made with reference to the smallest legal subdivisions, which was probably in accord with the rules and practice of the interior department of the general government: 26 Am. & Eng. Enc. Law, 377; *Altschul v. Clark*, 39 Or. 315 (65 Pac. 991); *Knight v. United States L. Assoc.* 142 U. S. 161 (12 Sup. Ct. 258; *Orchard v. Alexander*, 157 U. S. 372 (15 Sup. Ct. 635); *Bishop of Nesqually v. Gibbon*, 158 U. S. 155 (15 Sup. Ct. 779); *Scott v. Kansas Pac. Ry. Co.* 5 Land Dec. Dep. Int. 468; *Missouri, Kan. & T. Ry. Co.* 11 Land Dec. Dep. Int. 130. *Prima facie*, at least, this diagram shows that the road company, from which plaintiff derails title, was entitled to all lands designated by odd sections within the designated exterior

boundary, and consequently that the patent was regularly issued to the company.

Such being the record of the interior department, it entails upon the defendant the burden of impeaching it. To do this, counsel rely upon the certified plat from the Secretary's office, and the measurements and deductions made therefrom by the witness Mohr, as demonstrated by his enlarged plat, showing the three-mile limit by tangential lines drawn from points nearest the premises. The plat from the Secretary's office appears from accompanying certificates to have been made from the field notes of the survey of the road; but it is unaccompanied by the field notes. The certificate of Governor Woods attests that the plat shows, in connection with the public surveys so far as then made, the location of the line or route as actually surveyed, and upon which the road company's road was constructed, and that the road had been built and completed in all respects as required by the acts of Congress and the legislature of the State. Neither the act of Congress nor of the legislative assembly of the State required that any such map or plat should be filed in the office of the Governor or of the Secretary of State; nor does it appear that the plat so filed was the one approved by the Secretary of the Interior, representing the final survey and definite location of the road, much less that the Secretary of the Interior made use of the plat, or made his adjustment from it as the basis for determining the limits of the grant. Mr. Mohr seems to have treated the two parallel lines shown on the plat from the Secretary of State's office as indicating the outside marginal limits of the road, as well as the route of location, and, pursuing the idea, has made it thirty chains, or three eighths of a mile, in width at the points located nearest the land in dispute, selected as the

bases of his tangential measurements. It is hardly possible that the road should have been surveyed and located at any point of this width; the more reasonable hypothesis being that the two lines were used together to indicate the route of the surveyed line, with no intention of designating thereby the marginal limits, and that the witness has mistaken the very basis of his deductions. If wrong in his premises, he is inevitably wrong in his conclusions. But, with all this, giving full credence to the plat as indicating the final location of the road as constructed, and conceding that Mohr is correct in his premises, it does not appear to us that it is sufficient to impeach the official record of the land department of the general government; that is to say, it is not the better evidence as to the regularity of the adjustment of the grant.

3. If the land in dispute was without the grant, the Secretary of the Interior was without power or authority to place it within, much less to issue a patent therefor to the road company: *Doolan v. Carr*, 125 U. S. 618 (8 Sup. Ct. 1228); *Burfenning v. Chicago, St. Paul, M. & O. Ry. Co.* 163 U. S. 321 (16 Sup. Ct. 1018). But to show that fact there must needs be competent proof of it, and to show it against the *prima facie* records of the land department the proofs must not only be competent, but clear and convincing. A patent of the United States is presumptive evidence that the department had jurisdiction and that it rightfully exercised it, and, if there could have been any state of facts which under the laws would have given the department jurisdiction to dispose of the land comprised in the patent, the presumption is that such state of facts existed: *King v. McAndrews*, 111 Fed. 860 (50 C. C. A. 29); *St. Louis Smelt. Co. v. Kemp*, 104 U. S. 636. There is undoubtedly a map of definite location of this road on file with the land department and approved by that department (see *Wilcox v. Eastern Or. L. Co.* 176

U. S. 51, 57, 20 Sup. Ct. 269), which forms the real basis for the adjustment of the grant and constitutes the best evidence upon the subject, and, until that is produced and shown to be inaccurate, or the adjustment made from that as a basis is proven unwarranted, we cannot presume to set aside and nullify the action of the Secretary of the Interior, and declare void a patent issued by the general government. The defendant must therefore fail upon his proofs, as not having overcome by competent evidence the *prima facie* title of the plaintiff, exhibited by the records of the land department.

It follows the decree of the trial court must be reversed, and the cross-bill dismissed; and it is so ordered.

REVERSED.

Decided 27 June, 1904.

ANDERSON v. OREGON RAILROAD CO.

[77 Pac. 119.]

45 211
47 603n

RAILROADS — DUTY TO PREVENT ESCAPE OF SPARKS AND FIRE.

1. It is the duty of a railroad company to use reasonable care to procure the most approved appliances in practical use to prevent the escape of fire from its engines; and when such care has been used in endeavoring to obtain such appliances, the duty has been performed.

INSTRUCTIONS — ESTOPPEL TO OBJECT.

2. A party cannot be heard to object to an instruction that he has himself suggested.

INSTRUCTIONS ON ABSTRACT PROPOSITIONS.

3. When there is no evidence of certain facts, an instruction that if the jury find such facts to exist they may draw certain inferences therefrom is abstract and misleading, constituting reversible error.

RAILROADS — FIRES — PRESUMPTION OF NEGLIGENCE.*

4. In an action for damages caused by a fire started by locomotive sparks, a *prima facie* case is made by showing that the fire started through sparks thrown out by a passing engine and communicated to plaintiff's property, resulting in its injury.

COMPETENT EVIDENCE IN SUCH CASES.

5. In an action for damages by fire set out by a railroad locomotive, evidence that sparks escaped from the engines in large showers, or that sparks of unusual size were emitted and carried to a great height, or that an unusual volume was emitted, is admissible, though not necessary to showing a cause of action.

INSTRUCTIONS IN THEIR RELATION TO THE EVIDENCE.

6. Instructions as to disputed facts are always to be considered and construed in connection with the testimony, and the words used may not always have just the same meaning: for instance, the word "point" as used in the instruction here considered does not mean the exact spot where the fire occurred, but rather means along that part of the road.

CONSTRUING CONTRADICTIONARY EVIDENCE.

7. Where the testimony is conflicting the question in dispute should be left to the jury.

INSTRUCTION COVERED BY GENERAL CHARGE.

8. Requested instructions substantially covered by the charge already given may properly be refused.

From Umatilla: WILLIAM R. ELLIS, Judge.

Louis Anderson seeks by this action to recover from the Oregon Railroad and Navigation Company damages for loss of wheat by fire while in storage in a warehouse at Cayuse Station, in Umatilla County, which it is alleged was caused by the negligence of defendant in the operation of a train of cars. The negligence stated, in brief, is that the engines of defendant were unskillfully and improperly constructed, and improperly, carelessly, and negligently managed and overloaded, by reason whereof large quantities of sparks, burning cinders, and coals were emitted and ejected from such engines while passing in the vicinity, and were thrown upon said warehouse and other buildings in proximity thereto, which ignited and set them on fire, whereby they, together with their contents, were destroyed. The defendant is the appellant here.

AFFIRMED.

For appellant there was an oral argument by *Mr. Henry F. Conner*, with a brief over the names of *William W. Cotton*, *H. F. Conner*, and *Carter & Raley* to this effect.

I. A railroad company is liable for fires set out by its locomotives only in cases where the result has been brought about through the negligence of the company: *Koontz v. Oregon Ry. & Nav. Co.* 20 Or. 1 (23 Pac. 820); *Lesser Cot-*

NOTE.—As to Presumption of Negligence from Occurrence of Railway Fire, see 15 L. R. A. 40 and 42 Am. St. Rep. 538.—REPORTER.

ton Co. v. St. Louis, I. M. & S. Ry. Co. 114 Fed. 133; *Read v. Morse*, 34 Wis. 314; *Jackson v. Chicago & N. W. Ry. Co.* 31 Iowa, 76 (7 Am. Rep. 120); *Missouri, K. & T. Ry. Co. v. Mitchell* (Tex. Civ. App.), 79 S. W. 94.

II. A railroad company is not bound to use the best or most approved appliances to prevent the escape of fire. An instruction to that effect imposes a higher duty upon a railroad than is required: *Gagg v. Vetter*, 41 Ind. 228, 245 (13 Am. Rep. 322); *Spaulding v. Chicago & N. W. Ry. Co.* 30 Wis. 110, 121 (11 Am. Rep. 550); *Read v. Morse*, 34 Wis. 314; *Menominee v. Milwaukee*, 91 Wis. 447 (65 N. W. 176); *Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co.* 114 Fed. 133, 141; *Flinn v. New York Cent. R. Co.* 142 N. Y. 11 (36 N. E. 104); *Frace v. New York, L. E. & W. R. Co.* 143 N. Y. 182 (38 N. E. 102); *Hoyt v. Jeffers*, 30 Mich. 181; *Hogan v. Railroad Co.* 86 Mich. 615 (49 N. W. 509); *Hoff v. West Jersey R.* 45 N. J. L. 201; *T. P. & W. R. Co. v. Pindar*, 53 Ill. 447, 450 (5 Am. Rep. 57); *T. W. & W. R. Co. v. Corn*, 71 Ill. 493, 496; *Pittsburg v. Nelson*, 51 Ind. 150, 154; *Missouri, K. & T. Ry. Co. v. Mitchell*, (Tex. Civ. App.), 79 S. W. 94; 2 Shear. & R., Negligence, § 673.

III. An abstract instruction submitting to the jury a question regarding which there is no evidence is reversible error: *Breon v. Henkle*, 14 Or. 494, 507 (13 Pac. 289); *Roberts v. Parrish*, 17 Or. 583 (22 Pac. 136); *Woodward v. Oregon Ry. & Nav. Co.* 18 Or. 289, 299 (22 Pac. 1076); *Illinois Cent. R. Co. v. Davidson*, 64 Fed. 301, 305; *First Nat. Bank v. Hanover Nat. Bank*, 66 Fed. 34; *Wells v. Houston*, 23 Tex. Civ. App. 629, 646 (57 S. W. 584); *City Council v. Owens*, 111 Ga. 464, 480 (36 S. E. 830); *Fisher v. Central Lead Co.* 156 Mo. 479 (56 S. W. 1107).

IV. Where no standard is fixed, by reference to which the jury can consider the evidence, it is error to submit to the jury the question whether the facts which the evi-

dence tends to prove were a usual or unusual condition of things: *Flinn v. New York Cent. & H. R. R. Co.* 142 N. Y. 11, 19 (36 N. E. 1046); *Peck v. New York Cent. & H. R. R. Co.* 165 N. Y. 347 (59 N. E. 206); Century Dic. "Unusual."

V. And where the amount of sparks emitted are shown to be usual, without more, the inference is that their emission is inevitable and a consequence of the usual operation of the road: *Rosen v. Chicago*, 83 Fed. 300; *Flinn v. New York Cent. & H. R. R. Co.* 142 N. Y. 11, 19 (36 N. E. 1046).

For respondent there was a brief over the names of *Hailey & Lowell* and *Robert J. Slater*, with an oral argument by *Mr. Stephen A. Lowell*.

MR. JUSTICE WOLVERTON, after stating the facts in the above terms, delivered the opinion of the court.

1. The first assignment of error relates to the first clause of paragraph No. 4 of the court's charge to the jury, which is as follows:

"I instruct you that a railroad company is bound to use the best or most approved appliances for the purpose of preventing sparks or fire from escaping from its engines and being communicated to property of others rightfully lying upon or along the right of way."

The objection to this instruction proceeds upon the idea that the company was not absolutely bound to provide its engines with the most approved appliances for preventing the escape of sparks and cinders, but only to exercise reasonable care and diligence in supplying and annexing such appliances. The general rule seems to be that the company must adopt the most approved mechanical inventions and appliances to prevent the escape of fire, but that, when it has exercised reasonable diligence and precaution in obtaining and putting them into prac-

tical use, it has discharged its duty to those who are subject to the dangers incident to the escape of fire. If the company has in good faith sought to procure the best appliances, and has exercised reasonable care and diligence in obtaining them, and if, under all attending and surrounding circumstances, it has acted in the premises as a reasonable, prudent, and cautious person, having due regard to the rights of others, would have acted, then it has discharged its whole duty, and would not incur liability for damages arising from the escape of fire. The basis of the action is negligence, consisting in the want of the exercise of due care in providing the most approved appliances in known practical use. "The true rule is," says Judge SANBORN, with commendable perspicuity, "that, where the defendant has exercised reasonable care to provide the most effective machinery in known practical use to prevent the burning of private property, it has fully discharged its duty in that regard": *Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co.* 114 Fed. 133, 141 (52 C. C. A. 95). See, also, 13 Am. & Eng. Enc. Law (2 ed.) 473; Pierce, Railroads, 433; 2 Thompson, Comm. Law. Neg. § 2253; *Gulf, Colo. & S. F. Ry. Co. v. Reagan*, (Tex. Civ. App.) 32 S. W. 847; *Missouri, K. & T. Ry. Co. v. Mitchell*, (Tex. Civ. App.) 79 S. W. 94; *Flinn v. New York Cent. & H. R. R. Co.* 142 N. Y. 11 (36 N. E. 1046); *Railroad Co. v. Nelson*, 51 Ind. 150; *Hoyt v. Jeffers*, 30 Mich. 181. This instruction, therefore, states the law in the abstract, but, as applied in practice, the railroad company discharges its whole duty when it uses reasonable care and diligence in supplying and putting into practical use such most approved appliances.

The court, however, gave another instruction at the request of the defendant, which counsel for plaintiff claims cures the evil, if one exists. It is No. 12, and reads as follows:

"The duty to use reasonable care is performed when the company has equipped its engines with the most approved and best known spark-arresting appliances which are approved by the best practice of modern railroad managers, when it uses reasonable care to keep them in such a condition as to properly perform their functions, when it places its locomotives in charge of competent and skillful engineers, and when its locomotives are operated so as not to unnecessarily scatter fire."

The two instructions read together tell the jury, in effect, that the company is not liable unless the fire is communicated through its negligence, and that the duty to use reasonable care is performed when the company has equipped its engines with the most approved and best known spark-arresting appliances which are approved by the best practice of modern railroad managers, and when it uses reasonable care to keep them in a condition to perform their functions properly. But these do not eradicate the vice. It defines the reasonable care required to be the actual adoption of the most approved and best known spark-arresters and appliances, whereas the care and diligence required under the rule is in procuring such most approved appliances. Of course, the duty to exercise reasonable care is discharged when the appliances have been adopted and furnished, but it is also discharged when the company has exercised reasonable care and skill in its endeavor to furnish such appliances. The instructions are manifestly inaccurate in their statement of the law.

2. But the defendant asked and procured to be given still another instruction, incorporating precisely the same idea as the first paragraph of No. 4. We allude to instruction No. 14, which reads:

"I instruct you that, if you find that the wheat described in the complaint was burned by a fire communicated from the locomotive of the defendant, you must

nevertheless find for the defendant, unless you further find either that the defendant has failed to use the best and most approved appliances to prevent the unnecessary escape of fire from its locomotives, or unless the engines were overloaded," etc.

It is thus apparent that, whatever error there appears to be in the statement of the law, the defendant was actively instrumental in bringing it about, hence it cannot be heard to complain, and the case ought not to be reversed because of it.

3. The second and third assignments of error, which may be considered together, relate to the latter paragraph of instruction 4, and to instruction 5. The latter part of instruction 4 reads as follows:

"And if it is proved that an engine, at a particular time, threw an unusual quantity of sparks or coals of fire, you may consider that fact as to whether or not the engine, at such particular time, was either not in good order, or not properly constructed, or not skillfully and carefully managed, or otherwise."

The fifth instruction reads:

"I instruct you that it is the duty of the railroad company to see to it that its engines and trains are skillfully and carefully managed. And in this connection I instruct you that if you should find from the evidence that there was a heavy grade at the point where the alleged fire occurred, and that a train passing said point just prior to the discovery of the fire was so heavily loaded as to require the engines to be worked hard, and to cause them to emit an unusual quantity of sparks, these are circumstances which you have a right to consider in determining whether or not the engines attached to said train were skillfully and carefully managed."

The bill of exceptions shows that the following is all the testimony offered or received at the trial relating to the amount of sparks or coals of fire emitted from the locomotive or locomotives which it is claimed communi-

cated the fire to the buildings. Martin Madison, being called as a witness, testified on direct examination: "The train which was east bound passed Cayuse Station soon after noon on the 30th day of March, 1903. After doing some switching, the train backed up to the west end of the station yard, and, after stopping there from two to five minutes, went east past the warehouse which was burned, and then took a run for the hill which is east of Cayuse Station. When they passed the warehouse the front engine was all right, but this back engine, the little one, was doing its best. That is a common occurrence. They all do that. It is a heavy grade east of the station, and the engines have to work hard. The hind engine threw a little fire. It worked all it could when it passed the warehouse. I do not know anything about the grade opposite the warehouse, but I do know that the engines have to work pretty hard to get up the grade east of the station." And on cross-examination: "Q. You say the head engine was all right? A. Yes, it went all right, to my notion. The hind engine threw a little fire. It worked all it could."

Mrs. Sarah Strahn testified: "I was cooking for the section boss at Cayuse on March 30, 1903. I was seated in the section house (referring to Exhibit A). I saw the train come in. I do not know how large the train was. I know it was a heavy, loaded train, but do not know the number of cars. It was switching there. I heard the engine puffing and sending the heavy cinders through the heavy smoke. I always sit there and watch the cinders as the train is backing in and out. These cinders are scattered all over the track. I saw the cinders and heavy puffing when the train was pulling out, and cinders going through the smoke. I saw a good deal of smoke coming out of the rear engine that did the switching. It was dark blue or black, and I saw some cinders. The engine was

puffing quite hard when it went by, but there was nothing unusual in that, not for that place, because they always do that. I saw cinders coming out of the engine when it was switching. I did not count them." Questioned by defendant's counsel: "Were there a very large number? A. Only as they usually come out. Q. There was nothing unusual about that place? A. No, sir." And Jeremiah Galvin: "Q. You saw black smoke come out of the engine? A. There was black smoke sweeping over the warehouse. It was from the engine." And, continuing: "Was at Cayuse Station on March 30, 1903. Was there at the time of the fire. I noticed, as I drove up to the warehouse, there was a train standing on the track close to the warehouse, down the track from the warehouse, and I noticed a train near the bridge soon after I got in the warehouse; that train pulled up and passed, I noticed also. I concluded it was a very heavy train from the way the engine exhausted. I had a team tied at the back part of the warehouse, so I stepped out at the time and noticed that the engines were working very hard." And on cross-examination: "I was on the north side of the warehouse, looking after my team. The warehouse was between me and the train. There was a black smoke sweeping over the warehouse. I presume it was from the engine. It was pretty black. I think the engine on the rear end of the train was the heaviest smoke. The train was moving slow." The bill of exceptions also certifies that there was no evidence offered during the course of the trial tending to prove that there was a heavy grade at the point where the alleged fire occurred.

The objection to these instructions is that they are misleading and abstract, because it is insisted there was no evidence introduced tending to show that there was a heavy grade at the point where the alleged fire occurred, or that defendant's engines emitted an unusual quantity of

sparks If, as a matter of fact, there was no evidence in the case tending to prove these conditions, the mere statement of the court to the jury that, if they found them to exist, they could draw certain inferences therefrom, is the assumption of a fact in evidence contrary to the truth, making the instruction both misleading and abstract: misleading, because it submits to the jury a matter as if there were evidence to support it; and abstract, because in reality there is no question of the kind in the case, and it would constitute error: *Breon v. Henkle*, 14 Or. 494 (13 Pac. 289); *Woodward v. Oregon Ry. & Nav. Co.* 18 Or. 289 (22 Pac. 1076).

4. It may be further premised that railroad companies engaged in a lawful business, although they employ a dangerous element to generate the propelling force of their engines, can only be held accountable for loss or damage occurring to others by the communication of fire to their property because of the want of proper care and precaution, or, in other words, through their negligence in allowing it to escape. When, therefore, damages are sought to be recovered of the companies for the destruction of property by fire, the gist of the action is negligence, which must be sustained by proof, and they can not be held accountable for unavoidable or unusual consequences of the proper operation of the enterprise, that is, of their locomotives and trains: *Flinn v. New York Cent. & H. R. R. Co.* 142 N. Y. 11 (36 N. E. 1046); *Peck v. New York Cent. & H. R. R. Co.* 165 N. Y. 347 (59 N. E. 206); *Rosen v. Chicago, Gt. West. R. Co.* 83 Fed. 300 (27 C. C. A. 534); *Railroad Co. v. Pindar*, 53 Ill. 447 (5 Am. Rep. 57). It is sufficient to establish a *prima facie* case, however, for the plaintiff to show that fire has been communicated from an engine of the railroad company to his property, resulting in the damage or destruction thereof. Such proof raises a presumption of negligence

in the construction or management of the engine, and casts upon the defendant the burden of rebutting it. Such is said to be the uniform holding of the courts of England and of many of the states of the Union, and is now the established doctrine of this court: *Koontz v. Oregon Ry. & Nav. Co.* 20 Or. 3 (23 Pac. 820); *Richmond v. McNeill*, 31 Or. 342, 358 (49 Pac. 879, 3 Am. N. Y. Rep. 707); *Spaulding v. Chicago & N. W. Ry. Co.* 30 Wis. 110 (11 Am. Rep. 550); *Railroad Co. v. Westover*, 4 Neb. 268; *Railroad Co. v. Mills*, 42 Ill. 407.

5. Although the plaintiff may thus make out a *prima facie* case, it is pertinent and perfectly competent for it to produce other proofs, showing negligence, that may have a tendency in that direction. Thus, it may show that sparks were observed to escape from the engine in large showers, or in large and unusual size, or were carried to a great height and far away, or in unusual volume or quantities, from which the inference may be deduced that the engine was not provided with the proper spark-arresters, or was out of repair, or was carelessly or negligently managed; such manifestations not being the probable result of the ordinary working of an engine in good order and skillfully managed: *Louisville & N. R. Co. v. Taylor*, 92 Ky. 55 (17 S. W. 198); *Townsend v. Langles*, (C. C.) 41 Fed. 919; *Johnson v. Chicago, M. & St. P. Ry. Co.* 31 Minn. 57 (16 N. W. 488); *Henry v. Southern Pac. R. Co.* 50 Cal. 176.

6. The trial court in giving the instructions complained of had in mind, no doubt, some conditions of the kind, and the question recurs, was there evidence having a tendency to their support? The court has certified that there was no evidence tending to prove that there was a heavy grade at the point where the alleged fire occurred. It is not to the purpose that there was not a heavy grade at the exact point, that is, immediately opposite. The

evidence does tend to show that there was a hill or heavy grade east of the station, for Madison testified that the train went east, past the warehouse, and then took a run for the hill, which is east of the station; that it is a heavy grade; that the first engine was all right, but that the back engine, the little one, was doing its best; that it worked all it could when it passed the warehouse. From this testimony the very natural inference would be that the grade was just east of the station, and that the train had begun to ascend before its entire length had passed, as the hind engine was seen to be doing its best when it passed the station. It would be quite technical to construe the words "at the point" to mean at the very or exact point, when the grade was in such proximity that the train had begun its ascent before it had cleared the warehouse, and to require some tendency of proof upon that construction, when for all practical purposes, as it relates to the case in hand, the grade was at the station, not opposite, we should think, but at the station or point where the fire occurred, its foot resting at the station, or so near it that its effect was fully produced upon the rear engine before or as it was passing the station. In this view there was evidence to support this feature of the instruction.

7. As to the other objection, that there was no evidence tending to show that the engines were ejecting unusual quantities of sparks, the instruction must again receive a reasonable interpretation in connection with the facts of the case as developed. By a reference to the testimony of the three witnesses called upon the subject in hand, it will be observed that one of them testified that the little or hind engine was doing its best, was being worked all it could, when it passed the warehouse, and that it threw a little fire; another, that she heard the engine puffing and sending the heavy cinders through the heavy smoke, that she saw the cinders going through the smoke, and they

were scattered all over the track; and the other, that he concluded the train was very heavy from the way the engine exhausted, that the engines were working very hard, and that he saw black smoke ("it was pretty black") sweeping over the warehouse, and "the train was moving very slow." Within the cases last above cited, this evidence was of a nature competent to go to the jury, from which they could rightfully infer that the engines were either not in good order or were not skillfully and carefully managed. It is very apparent, if the testimony is to be believed, that the hind engine was working very hard, doing its best, and that a large volume of smoke and quantities of heavy cinders were emitted therefrom, so much so that the cinders were scattered all over the track. That it ejected an unusual quantity of sparks or coals of fire may be fairly inferred when viewed in the light of the ordinary workings of the train under similar conditions. True, one of the witnesses said there was nothing unusual about the puffing of the engines, or the cinders coming out of the little one at that place, yet this did not preclude the effect of the entire testimony that there were large quantities of heavy cinders ejected, and, while the expression of the court may have been somewhat inapt, yet we cannot think that the jury were misled by it or induced to take a wrong view of the situation. Indeed, they could not have been misled, considering the reasonable intentment of the instructions, which were manifestly germane to the subject-matter of the controversy.

This leaves for our consideration the fourth and fifth assignments of error. The fourth relates to the interpolation of the phrase "and did so do" in an instruction asked by the defendant before giving it. By a grammatical construction of the latter instruction, however, the language complained of does not change its meaning in a

material sense, serving only as reiteration of the preceding expression.

8. The fifth relates to an instruction requested but not given. This was, for all practical purposes, covered by instruction 12 of the general charge, hence there was no error in refusing it.

The judgment of the trial court will be affirmed, and it is so ordered. AFFIRMED.

Argued 29 June, decided 18 July, 1901.

WRIGHT v. ASTORIA COMPANY.

[77 Pac. 599.]

VENDOR AND PURCHASER — TIME AS ESSENCE OF THE CONTRACT.

1. Time of payment is not of the essence of a contract for the sale of real estate in equity, unless made so by express agreement of the parties, by the nature of the contract itself, or by the circumstances under which the contract was executed.

SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY — DELAYED PAYMENT.

2. Specific performance of a sale of real estate will ordinarily be compelled, though the purchase price was not paid or tendered at the exact time fixed, when the party seeking performance has acted in good faith, and with reasonable diligence, unless there has been a change of circumstances affecting the equities of the parties.

DELIVERY OF ESCROW DEED — RIGHTS OF SUBSEQUENT PURCHASER.

3. Where, under a contract for the sale of real estate, the deed was deposited in escrow, to be delivered on payment of the price after examination of the title by the purchaser's attorneys, and there was no understanding or stipulation that the deed should not be delivered unless the price was paid on a particular day, and no attempt was made to withdraw the deed before the conditions of the deposit had been complied with by the grantee, title passed to such grantee on delivery of the deed as against a purchaser from the grantor after the deed was delivered.

From Linn: REUBEN P. BOISE, Judge.

Suit by the Wright-Blodgett Company, Limited, a partnership association of Michigan, against the Astoria Company, a private corporation of New Jersey, to remove a cloud from the title to real estate. Defendant asserted that an escrow deed under which plaintiff claimed had been delivered without authority and was void. Plaintiff

had a decree as prayed, hence this appeal. The case was submitted on briefs under Rule 16 of the Supreme Court: 35 Or. 587, 600. AFFIRMED.

For appellant there was a brief over the name of *Weatherford & Wyatt* to this effect.

I. Time is the essence of the contract and delivery of the escrow contrary to the terms of the agreement is of no force or effect: *Smith v. South Royalton Bank*, 32 Vt. 341 (76 Am. Dec. 179); *Black v. Shreve*, 13 N. J. Eq. 455.

This is particularly so where the property is subject to marked fluctuations in value: *Tyler v. Cate*, 29 Or. at p. 526.

II. If the grantee gets possession of the instrument put in escrow, contrary to the agreement of the parties, no title passes thereby: *Gaston v. Portland*, 16 Or. 255, 259 (19 Pac. 127); *Hilgar v. Miller*, 42 Or. 552 (72 Pac. 319); *Everts v. Agnes*, 4 Wis. 154 (65 Am. Dec. 314); *Bryson v. Bradshaw*, 23 Cal. 520; *Steffian v. Milmo Nat. Bank*, 69 Tex. 513 (6 S. W. 824.)

For respondent there was a brief over the name of *Laufin M. Curl* (*Percy R. Kelly*, of counsel,) to this effect.

1. An escrow is a contract by which the person to whom the deed is delivered is made the agent of both parties. The grantor cannot then control the deed, and the grantee can entitle himself to it by performing the stipulations. When the condition provided for is complied with the depositary is bound to deliver the deed: 3 Washburn, Real Prop. (4 ed.) 318, 324; 2 Wharton, Contracts, 679; *Wellborn v. Weaver*, 17 Ga. 267 (63 Am. Dec. 235, 241); *Wight v. Railroad Co.* 16 B. Mon. 4 (63 Am. Dec. 522); *Fairbanks v. Metcalf*, 8 Mass. 238; *Word v. Lewis*, 21 Mass. (4 Pick.) 520; *Hagood v. Harley*, 25 Mass. (8 Pick.) 325; *Millet v. Parker*, 43 Mass. (2 Met.) 608 (37 Am. Dec. 115);

Regan v. Howe, 121 Mass. 424; *McKearns v. Massey*, 6 Kan. 122; *Grove v. Jennings*, 46 Kan. 366; *Ordinary v. Thatcher*, 12 Vroom, 403 (32 Am. Rep. 225); *Cannon v. Handley*, 72 Cal. 133, 140; *McDonald v. Huff*, 77 Cal. 279; *Bury v. Young*, 98 Cal. 446 (35 Am. St. Rep. 186); *Bowles v. Woodson*, 6 Grat. 78; *Shirley v. Ayers*, 14 Ohio, 308 (45 Am. Dec. 546); *Davis v. Clark*, 48 Pac. 563; *Dawson v. Hall*, 2 Mich. 390; *Foster v. Mansfield*, 3 Met. 412 (37 Am. Dec. 154); *Schrugham v. Wood*, 15 Wend. 545 (30 Am. Dec. 75); *Gilbert v. North Amer. Ins. Co.* 23 Wend. 43 (35 Am. Dec. 543); *Worrall v. Munn*, 5 N. Y. 529 (55 Am. Dec. 440).

2. A knowledge of an outstanding unrecorded deed prevents one from becoming a *bona fide* purchaser as against the first grantee: *Moore v. Thomas*, 1 Or. 201, 205; *Musgrove v. Bonser*, 5 Or. 314 (20 Am. Rep. 737); *Baker v. Woodward*, 12 Or. 3, 13 (6 Pac. 173); *Manaudas v. Mann*, 14 Or. 450, 452 (13 Pac. 449); *Riddle v. Miller*, 19 Or. 468, 470 (23 Pac. 807); *Raymond v. Flavel*, 27 Or. 219, 240 (40 Pac. 158); *Jennings v. Kiernan*, 35 Or. 349 (55 Pac. 443); *Marshall v. Roberts*, 22 Minn. 49; *Galland v. Jackman*, 26 Cal. 79 (85 Am. Dec. 172); *McDonald v. Huff*, 77 Cal. 279; *Wittenbrock v. Cass*, 110 Cal. 1; *Farnsworth v. Childs*, 4 Mass. 637 (3 Am. Dec. 251).

3. If the facts known by the second vendee were such that reasonable diligence would have disclosed the facts, equity will not aid it in its present predicament: Devlin, *Deeds* (2 ed.), § 317a; 1 Story, *Eq. Juris.* § 146; *Riddle v. Miller*, 19 Or. 468 (23 Pac. 807); *Cooper v. Thomason*, 30 Or. 161 (45 Pac. 296); *Hodge v. United States Steel Corp.* — N. J. Eq. — (60 L. R. A. 742, 748, 54 Atl. 1).

4. Time cannot be made of the essence of the contract by one of the parties alone; it must be mutually expressed to make it so. If time is stipulated to be essential and delay takes place, the aggrieved party may give notice that he abandons the contract, and if the other party does not

promptly object, he will be considered as acquiescing in such notice and as abandoning his equity of performance: *Adams*, Equity (5 Am. ed.), 208, note 1; *Schneider v. Lehnherr*, 5 Or. 385; *Tyler v. Cate*, 29 Or. 515, 527 (45 Pac. 800); *Bank of Columbia v. Hagner*, 26 U. S. (1 Pet.) 454, 465; *Hubbell v. Von Schoening*, 49 N. Y. 330, 331; *Johnson v. McMullin*, 3 Wyo. 237 (4 L. R. A. 670, 672, and note).

5. Prescribing a day at or before which, or a period within which, an act must be done, even with a stipulation that it shall be done at or before that time, does not render time essential with respect to such act: *Barnard v. Lee*, 97 Mass. 92; *Quinn v. Roach*, 37 Conn. 17; *Viele v. Troy R. Co.* 21 Barb. 381; *Duffy v. O'Donovan*, 46 N. Y. 223; *Hubbell v. Von Schoening*, 49 N. Y. 330; *Morgan v. Herrick*, 21 Ill. 481; *Hall v. Delaplaine*, 5 Wis. 206 (68 Am. Dec. 57); *Brazier v. Gratz*, 19 U. S. (6 Wheat.) 528, 533.

MR. JUSTICE BEAN delivered the opinion of the court.

This is a suit to remove a cloud from title. The material facts are practically undisputed. In the latter part of October, 1901, J. J. Collins contracted with John Holland to purchase from him for the plaintiff 160 acres of unimproved timber land in Linn County for \$2,000. On November 5th Holland and wife executed a deed to the plaintiff for the property, and delivered it to Collins under an agreement that he should deposit it with the banking firm of J. W. Cusick & Co., at Albany, to be held by the bank until an abstract could be procured, the title approved, and plaintiff make payment of the purchase price, when the bank should deliver the deed to it. Collins deposited the deed with the bank, as agreed upon, where it remained until the 22d of November, when the purchase price was paid to the bank between 2 and 3 o'clock in the afternoon, and the deed delivered to the plaintiff's agent,

without any notice or knowledge of an adverse claim to the property. About 11 o'clock on the same day, however, the defendant company contracted orally with Holland to purchase the property for \$2,250, and at 6 o'clock in the afternoon, after the delivery of the deed by the bank to the plaintiff, Holland made a deed purporting to convey the property to the defendant. At the time of the purchase the defendant was advised of the previous deed, and obtained from Holland an order on the bank for its possession. The only substantial conflict is as to the time the purchase price was to be paid by the plaintiff to the bank and the deed taken up. The contention for the defendant is that the money should be paid by the 12th of November, and its testimony tends to show that the agreement was to this effect. Collins, on the other hand, says that the understanding was that the deed, together with a large number of deeds from other parties for land in the same vicinity, should be deposited with the bank by that date, and the purchase price should be paid thereafter as soon as abstracts of title could be secured and the title examined. We do not regard this point as at all material, however.

1. It is agreed by all that the deed was made and deposited by Holland with the bank to be delivered to the purchaser upon the payment of the purchase price, and that there was no withdrawal, or attempted withdrawal, of the deed before the conditions of the deposit were complied with by the grantee. Even if the purchase price was to be paid, as defendant contends, on or before the 12th of November, time was not a material or an essential part of the contract, nor was it made the essence thereof by agreement of the parties. There was no understanding or stipulation that the deed should not be delivered unless plaintiff paid the purchase price by a day certain. In equity the time of payment is not of the essence of a

contract for the sale of real estate unless made so by express agreement of the parties, by the nature of the contract itself, or by the circumstances under which the contract was executed.

2. Specific performance of a contract for the sale of real estate will ordinarily be decreed, even though the purchase money was not paid or tendered at the exact time fixed by the contract, when the party seeking the performance has acted in good faith, and with reasonable diligence, unless there has been such a change of circumstances affecting the equities of the parties or the justice of the contract as to make it inequitable that it should be enforced: *Knott v. Stevens*, 5 Or. 235; *Frink v. Thomas*, 20 Or. 265 (25 Pac. 717, 12 L. R. A. 239); *Bank of Columbia v. Hagner*, 26 U. S. (1 Pet.) 454; *Barnard v. Lee*, 97 Mass. 92; *Hall v. Delaplaine*, 5 Wis. 206 (68 Am. Dec. 57).

3. The plaintiff in this case was guilty of no laches. It paid the money to the bank as soon as the abstract had been prepared and the title approved by its attorney, and there is nothing in the character of the property or the nature of the transaction to indicate that the time of payment was intended to be essential. The property in controversy was unimproved timber land. The evidence indicates that at the time the plaintiff contracted for its purchase it was increasing in value, but there is nothing to show that it was of such an uncertain or fluctuating value as to make time the essence of the contract when not so provided therein. If, as the defendant contends, the agreement was that the purchase price should be paid by the plaintiff on or before the 12th of November, Holland perhaps had a right, upon a failure to make such payment, to revoke the deposit and recall the deed; but he did nothing of the kind. On the contrary, he allowed the deed to remain on deposit with the bank, and when the conditions of the deposit were subsequently complied

with by the grantee, and the deed delivered to it by the bank, the title passed, and Holland could not thereafter convey the property to another.

It follows that the decree of the court below must be affirmed, and it is so ordered. AFFIRMED.

Argued 30 June, decided 1 August, 1904.

MUCKLE v. GOOD.

[77 Pac. 748.]

OWNERSHIP OF LAND BETWEEN HIGH AND LOW-WATER MARK.

1. Land between ordinary high and low-water mark along a tidal stream belongs to the State, and *prima facie* its deed carries the title.

QUIETING TITLE—NEED OF ADVERSE POSSESSION.

2. A naked claim of title by adverse possession not based on color of title, or accompanied by actual possession, will not support a suit to quiet title, or require a showing of the defendant's claim.

From Columbia: ARTHUR L. FRAZER, Judge.

Suit by James Muckle, Jr., and Charles Muckle against James Good to quiet the title to certain land. From a decree for defendant plaintiffs appeal. AFFIRMED.

For appellant there was a brief over the name of *Dillard & Day*, with an oral argument by *Mr. William B. Dillard*.

For respondent there was a brief and an oral argument by *Mr. Samuel H. Gruber*.

Mr. Justice BEAN delivered the opinion of the court.

This is a suit to quiet title to a tract of land on the Columbia River, in front of the Town of St. Helens. The plaintiffs do not assert any record or paper title, but base their right alone on an alleged adverse possession for more than ten years. The defendant denies that the plaintiffs are the owners or in possession of the property, and asserts title in himself by mesne conveyances from the grantees of the State; alleging that it is tide land, and as

such was conveyed by the State to his predecessors in interest in 1883. The land in question lies along the margin of the Columbia River, between low-water mark and a precipitous ledge of rock about one hundred and fifty feet distant therefrom. This ledge of rock is practically parallel with the river, and forms the east line of the Strand—a street in St. Helens—and the west bank of the river, making the line of high water. The Columbia River at St. Helens is a tidal stream, and at an ordinary stage of the water is affected by the diurnal tides from the ocean. At extreme low water the tide rises perpendicularly from one to four feet, and a space of from fifty to sixty feet wide of the land in controversy is alternately covered and uncovered by the ordinary fluxes and refluxes of the tides. During the winter and spring freshets, however, the rain and melting snows cause the river to rise to such a height that for a month or two in the winter and two or three months in the summer the effect of the tide is not perceptible. During such time the water extends up to the perpendicular bank of the stream, and the land in controversy is entirely covered. The land covered and uncovered by the tide at extreme low water becomes submerged whenever the river has risen from two to four feet. The water is still affected by the tides, however, though in less degree; another but narrower strip of land, farther up the shore, being covered and uncovered by it. As the water continues to rise, the tides flow and reflow over another still narrower strip of shore, until the perpendicular bank is reached.

1. For the plaintiffs it is contended that, upon this state of facts, the deed from the State to the defendant's grantors conveyed no title, because the land is not tide land, within the meaning of the act of 1878 (Laws 1878, p. 41,) authorizing the sale of such land. We do not think it necessary in this case, however, to determine that ques-

tion. The land lies between ordinary high and low water, and was therefore, in any event, the property of the State: *Hinman v. Warren*, 6 Or. 408; *Parker v. Taylor*, 7 Or. 435; *Olney v. Moore*, 13 Or. 238 (11 Pac. 187); *Bowlby v. Shively*, 22 Or. 410 (30 Pac. 154); *Shively v. Bowlby* 152 U. S. 1, (14 Sup. Ct. 548). The river is a tidal stream. The board of school land commissioners found the land to be in fact tide land, and as such conveyed it to the defendant's predecessors in interest. The title thus acquired by the grantees of the State is good against the plaintiffs, who, in our opinion, have no title, either legal or equitable.

2. A mere presumptive title, founded upon a lawful possession under a claim of right, may in some instances be sufficient to sustain a complaint to remove a cloud from title against an adverse claimant, whose title is weaker than that of the plaintiff, or who has no title at all: *Giltenan v. Lemert*, 13 Kan. 476; *Loomis v. Roberts*, 57 Mich. 284 (23 N. W. 816). A mere naked claim of title, however, by a plaintiff not in possession, is not sufficient to authorize him to institute a suit, or require an exhibition of the nature of the estate or title of the defendant. The plaintiff must have some right based upon title, actual or presumptive, and such title must be shown by him before the adverse claimant can be required to produce the evidence upon which he rests his claim: *Stark v. Starrs*, 73 U. S. (6 Wall.) 402. Now, in this case the plaintiffs do not assert any paper or record title, but base their right alone on adverse possession, and this claim is not supported by the testimony. At the time this suit was instituted, no part of the property was in the actual possession of any one, except a small space occupied by a building of the defendant. Plaintiffs never had such an exclusive, open, and hostile possession under a claim of right as to give them title by adverse possession. The

testimony upon this point is clear and convincing, and it would serve no useful purpose to set it out in detail.

The decree is therefore affirmed. AFFIRMED.

MR. CHIEF JUSTICE MOORE took no part in this decision.

Decided 20 June, 1904.

GENTRY v. PACIFIC LIVESTOCK CO.

[77 Pac. 115.]

EQUITY—DECREE ON APPEAL—RES JUDICATA.

1. Under B. & C. Comp. § 406, providing that, on an appeal from a decree in equity, the case shall be tried *de novo* and a final decree entered by the appellate court, without reference to the findings of fact or conclusions of law of the trial court, the rights of the parties and the questions adjudicated must in subsequent litigation be ascertained from the decree on appeal, and not from that of the court below.

EQUITY CASES ON APPEAL—VALUE OF FINDINGS AND CONCLUSIONS.

2. In equity under the Oregon practice as prescribed by Sections 406 and 555, B. & C. Comp., a suit is tried anew on appeal on the transcript and evidence, without reference to the findings or conclusions of the trial court, the appeal being from the decree.

RES JUDICATA.

3. A suit or judgment between parties upon a different claim from one in question is an estoppel as to those matters only that were formerly actually determined.

This rule is thus illustrated: Plaintiff sued to enjoin defendant from trespassing on or interfering with its possession of certain land, alleging that defendant went into possession as the agent and servant of plaintiff and afterwards wrongfully took possession in his own behalf. The trial court issued a preliminary injunction, but on trial found that, when defendant entered on the land, it was unsurveyed public land which he intended to enter as a homestead, and that, though the entry was by the advice of plaintiff, it was not under any contract with it, and that defendant did not hold possession for plaintiff's benefit, or as its agent or employé. A decree was entered dismissing the suit and vacating the preliminary injunction. On appeal the court found that there was no error, and decreed that the decree below be affirmed, the temporary injunction dissolved, and the suit dismissed. The opinion rendered showed that the supreme court concluded that the defendant did enter into possession under the contract alleged in the complaint, but was of the opinion that this contract was illegal and void, and the decree below was affirmed on this ground. *Held* that, as affirmance of the trial court's decree did not involve approval of its conclusions of fact, the decree on appeal was not *res judicata* as to defendant's right to recover from plaintiff the value of hay cut from the premises by plaintiff during the pendency of the preliminary injunction.

SOURCE OF POWER OF ESTOPPEL BY JUDGMENT.

4. Though, generally speaking, the force of an estoppel by judgment may be said to reside in the decree and not in the reasons for it, still, if the decree relied upon is ambiguous, the opinion given in connection with it may be examined to determine just what was decided, in considering the effect of the decree as

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res judicata: for instance, a decree on appeal in a suit in equity that the decree of the lower court be affirmed, and that appellant is not entitled to the relief prayed for, and that the complaint is without merit and should be dismissed and a temporary injunction issued by the court below dissolved, is ambiguous, so as to justify examination of the opinion to determine what point was actually decided.

From Malheur: MORTON D. CLIFFORD, Judge.

Action by James Gentry against the Pacific Livestock Company, resulting in a judgment as prayed for, from which defendant appeals. REVERSED.

For appellant there was a brief and an oral argument by *Mr. John L. Rand*.

For respondent there was a brief over the name of *Biggs & Biggs* with an oral argument by *Mr. Dalton Biggs*.

MR. JUSTICE BEAN delivered the opinion of the court.

In June, 1899, the Pacific Livestock Company commenced a suit in equity in the circuit court for Malheur County against James Gentry to enjoin and restrain him from trespassing on or interfering with its possession of certain real property in that county, known as the "Rinehart Springs Ranch." In its complaint it alleged, in substance, that it was the owner in fee and entitled to the immediate possession of the property in question; that in 1895 it employed the defendant to reside upon and care for the property, cultivate and harvest the hay crop growing and to be grown thereon, to keep the place in repair, and generally to do any and all things needful and necessary to protect its possession and enjoyment thereof; that, in pursuance of such employment, Gentry went into possession as its agent and servant, and so remained until 1898, when he wrongfully and unlawfully, and in violation of his contract, pretended to take possession of the property in his own behalf, ousted the servants and employés of the livestock company, and threatened to appropriate to his own use large quantities of hay and grain

growing thereon, its property. Gentry, for his answer, denied all the allegations of the complaint, except his possession of the property, and for an affirmative defense alleged that in October, 1894, the land in controversy was unsurveyed public land of the United States; that he settled upon the same with the intention of entering it under the homestead law, as soon as it should be surveyed, and had ever since continued to reside upon, cultivate, and improve the same. The reply put in issue the new matter in the answer, and upon the trial the court found that on or about October 21, 1894, Gentry, with the consent and by the advice of the livestock company, settled upon the land in controversy, which was then unsurveyed public land of the United States, with the intention of entering it as a homestead; that at the time of his settlement an oral agreement was entered into by and between him and the livestock company, whereby he promised and agreed to harvest and put up the hay growing and raised annually on the land, and deliver the same to the company, and to establish and maintain a camp or stopping place for the accommodation and board of its employés and for the feeding of its cattle, in consideration of which it was to pay him \$25 a month and supply him with all necessary tools, machinery, labor, etc.; that Gentry did not enter into possession of the premises under or by virtue of any contract with or employment by the livestock company, and did not hold possession for its benefit or as its agent or employé; that it was not the owner or entitled to the possession of the property; that ever since October, 1894, except when prevented by the preliminary injunction, Gentry occupied and cultivated the land, with the intention of entering the same under the homestead law, and made valuable improvements thereon. As conclusions of law the court found that Gentry was entitled to the exclusive possession of

the property and that plaintiff's complaint should be dismissed. A decree was thereupon entered, ordering and adjudging that plaintiff's complaint, "filed herein, be, and the same is hereby, dismissed, and that the temporary injunction existing herein against the defendant be, and the same is hereby, dissolved and vacated."

From this decree an appeal was taken, and on a trial *de novo* this court found that there was "not error as alleged," and "considered, ordered, and decreed that the decree in this cause in the court below rendered be, and the same hereby is, in all things affirmed; and, it appearing to the court and the court further finding that the appellant is not entitled to the relief prayed for, or any part thereof, and that the complaint herein is without merit and should be dismissed, and the temporary injunction issued by the court below dissolved, it is now therefore further ordered and decreed that the complaint herein be, and the same is hereby, dismissed, and the temporary injunction issued by the court below dissolved and vacated." Thereafter Gentry commenced this action against the livestock company to recover the value of the hay taken by it from the premises in controversy after the issuing of the preliminary injunction. The court below held that the decree in the equity suit was a conclusive adjudication in favor of Gentry as to his right to the possession of the property and to the hay sued for, and that the only issue for trial was the question of value.

1. Under our statute, on an appeal from a decree in a suit in equity, the case is tried *de novo*, and a final decree entered by the appellate court, without reference to the findings of fact or conclusions of law of the trial court: B. & C. Comp. §§ 406, 555. The rights of the parties and the questions adjudicated must therefore be ascertained from the decree on appeal, and not from that of the court below.

2. The statute requires the trial court, in rendering its decision in an equity suit, to set out in writing its findings of fact and conclusions of law. Such findings of fact and conclusions of law, however, must be separate from the decree, filed with the clerk, and incorporated in the judgment roll. They are to have the force and effect of, and to be equally conclusive as, the verdict of a jury in an action at law, "except on appeal to the supreme court the cause shall be tried anew without reference to such findings": B. & C. Comp. § 406. Under this statute and Section 555, B. & C. Comp., a suit in equity is tried in this court upon the transcript and evidence accompanying it, without reference to the findings of fact or conclusions of law of the trial court, and they form no part of the decree, unless incorporated therein or made a part thereof by appropriate reference. The appeal in an equity suit is from the decree, which is required to be separate from the findings of fact and conclusions of law.

3. In the suit of *Pacific Livestock Co. v. Gentry*, 38 Or. 275 (61 Pac. 422, 65 Pac. 597), the decree of the court dismissing the complaint was affirmed, not the findings of fact upon which the decree was based, which were not incorporated in or made a part of the decree, and therefore were in no way approved or affirmed. Indeed, the opinion shows that this court did not agree with the trial court's construction of the evidence. Instead, it concluded that Gentry entered into possession of the property under the contract as alleged in the complaint, but that such contract was illegal and void, and the court would refuse to enforce it, because both parties contemplated the acquisition of the title to public land in violation of the laws of the United States." The decree was a final adjudication as to the right of the company to maintain the suit, and is a bar to a subsequent prosecution of another suit by it against Gentry upon the claim or de-

mand. In an action between the same parties upon a different claim or demand, however, it can operate as a bar or estoppel only as to matters in issue and which were actually litigated and determined: *La Follett v. Mitchell*, 42 Or. 465 (69 Pac. 916, 95 Am. St. Rep. 780); *Cromwell v. County of Sac*, 94 U. S. 351. Neither the title to the hay grown on the disputed premises nor the question of the rights of the respective parties thereto was in issue on the former suit, or litigated or determined thereby. The only question was the right of the livestock company to enjoin and restrain Gentry from violating the contract alleged in the complaint, and from trespassing on the premises and interfering with its possession and right thereto. The plaintiff was denied the relief sought, not because the contract was not made as averred, but because it was against public policy and good morals. The court refused to enforce the contract because of its illegality, and dismissed the suit, without determining any other issue in the case. It is true the decree itself is silent as to the ground upon which it was rendered, but resort may be had to other parts of the record to ascertain that point.

As a general rule, an estoppel by judgment resides in the judgment itself, and not in the reason for rendering it, and, when the decree is definite and certain, the opinion of the court cannot be used to show what matters were considered or determined: 1 Van Fleet, Former Adjudication, § 278. Where, however, the decree is ambiguous, as in this case, or fails to show upon which of several issues it is founded, the opinion may, we think, be examined to determine what point was actually decided: *Strong v. Grant*, 2 Mackey, 218; *Pepper v. Donnelly*, 87 Ky. 259 (8 S. W. 441); *Legrand v. Rixey's Adm'r*, 83 Va. 862 (3 S. E. 864).

It follows that the judgment of the court below must be reversed, and a new trial ordered. REVERSED.

Argued 6 July, decided 15 August, 1904.

ELDRIDGE v. HOEFER.

[77 Pac. 874.]

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CROSS-EXAMINATION—EXPLANATORY MATTER.

1. All the facts relating to a material question should be brought out if they are desired: for instance, in an action for conversion of a building claimed by both parties, it having been shown as an admission against interest that plaintiff had possession of the house and sold it, and that defendant then leased it from the vendee, defendant is entitled to explain his action.

CREATION OF RELATION OF LANDLORD AND TENANT.

2. In view of Section 253, B. & C. Comp., which entitles a purchaser of realty at an execution sale to immediate possession, an agreement between such a purchaser and the former owner that the latter may retain possession at a stipulated rent, with the privilege of redeeming after the statutory period for so doing has expired, creates the relation of landlord and tenant between them.

RIGHT OF TENANT TO REMOVE FIXTURES AFTER OUSTER.

3. A tenant who has been wrongfully ousted from his leased land may reënter within a reasonable time, which will be determined from the circumstances, and remove his improvements, not injuring the freehold.

TROVER BY TENANT AGAINST LANDLORD.

4. Trover may be maintained by a tenant against his landlord for the seizure and conversion of chattels left upon his having been wrongfully evicted from the leased premises.

LIMITATION IN TROVER ACTIONS.

5. Trover by a tenant whose landlord wrongfully evicted him and converted sundry of his chattels on the premises is barred only by the general statute of limitations.

MEASURE OF DAMAGES IN ACTIONS OF TROVER.

6. The measure of damages in trover for conversion of an article which has been returned to and accepted by plaintiff, when special damages are not alleged, is the value of the property at the time of the conversion, with interest thereon to the trial, less its value when returned, with interest thereon from that date, and not the value of its use while in defendant's possession.

From Marion : GEORGE H. BURNETT, Judge.

This is an action by F. J. Eldridge against John Hoefer and another, partners, to recover damages for the conversion and use by the defendants of a hophouse for the years 1896 to 1901, inclusive. It is alleged in the complaint that plaintiff is the owner of the hophouse in question; that in August, 1896, the defendants wrongfully and unlawfully seized and took possession of it, and converted the same to their own use until August 20, 1902, when it was restored to the plaintiff; that during all such time the defendants

continuously used and occupied the house, to plaintiff's damage in the sum of \$1,930; that at the time of the conversion, in 1896, the house was worth \$840, and in August, 1902, at the time the possession was regained by the plaintiff, its value was \$500; that during the time defendants used and occupied the house, the reasonable rental value thereof was \$225 a year for drying hops, and \$40 a year for storing hops, and, by reason of the wrongful and unlawful withholding of the possession of the same, and the use and occupation thereof, by the defendants, the plaintiff was damaged in the sum of \$1,590.

The answer denies plaintiff's ownership of the house, the wrongful possession thereof by the defendants, that the reasonable value of the use was any greater sum than \$50 a year, and, for an affirmative defense, alleges that the house was built by the plaintiff on the premises of the defendants in payment of the rent of a hopyard for the year 1895; that at the expiration of the lease the plaintiff surrendered to the defendants the possession of the premises, together with the house, and the defendants occupied and used the same until August, 1902, when the plaintiff wrongfully and unlawfully removed the house therefrom without the knowledge or consent of the defendants.

The reply denies the material allegations of the answer, and affirmatively alleges that on and prior to December 19, 1894, plaintiff was the owner of the premises upon which the hophouse was built, and on that day a decree was rendered foreclosing a mortgage given by him to Goodman & Son, and ordering the sale of the mortgaged premises; that the property was subsequently sold under the decree, and purchased by Goodman & Son, who thereafter assigned and transferred the certificate of sale to the defendants; that, under an agreement made with the defendants, the plaintiff remained, in possession of the premises, agreeing to deliver to them one third of the hops

grown thereon each year, as rent; that defendants proposed to him that they would give him two years in addition to the time allowed by law in which to redeem from the sale under the foreclosure decree if he would build and equip at his own expense a hophouse on the premises, which should belong to him until the redemption; that, relying upon such agreement, he built and equipped the house, and remained in possession until some time in August, 1896, when the defendants repudiated the contract, ousted the plaintiff, and unlawfully took possession of the hophouse, and continued in possession thereof until August, 1902. The plaintiff had verdict and judgment for \$1,500, and defendants appeal, assigning as error the admission and rejection of testimony, the overruling of a motion for nonsuit, and the giving of certain instructions.

REVERSED.

For appellants there was a brief and an oral argument by *Mr. George G. Bingham*.

For respondent there was a brief over the names of *Peter H. D'Arcy* and *Carson & Adams*, with an oral argument by *Mr. D'Arcy* and *Mr. Loring K. Adams*.

Mr. Justice BEAN, after stating the facts in the above terms, delivered the opinion of the court.

1. The hophouse in controversy was built by the plaintiff in 1895 on premises formerly owned by him, but which had previously been sold under a decree of foreclosure, the sale confirmed, and the certificate of sale purchased by the defendants, who subsequently received a deed for the premises. About August 20, 1902, the plaintiff, without defendants' knowledge or consent, removed the house to an adjoining tract of land and sold or pretended to sell it to one Aral. On September 5, 1902, the defendants, by contract, in writing with Aral, leased the house for that

year at a rental of \$15 a day for the time it should be used by them. This lease was introduced in evidence as an admission by the defendants of title to the house in the plaintiff, Aral's assignor. The defendants offered, but were not allowed, to show that the reason they made the lease was that the house had been moved from their premises by Eldridge at the beginning of the hop-drying season, and that they had no other house which they could use, and so made the contract of leasing in order to save their crop. This evidence was, in our opinion, competent, and should have been admitted. There was a sharp conflict between the parties as to the contract under which the plaintiff built the house, and its ownership; defendants insisting that it was built for them in payment of the rent for the year 1895, and therefore belonged to them. The plaintiff, however, contended that it was built by him in consideration of an agreement with the defendants, by which he was to remain in possession of the premises for two years after the time allowed by law for the redemption thereof had expired, with the right to redeem within such time, and that such agreement was wrongfully terminated by the defendants, and the house converted to their own use. The lease of the house from Aral by the defendants was a circumstance tending to support the plaintiff's contention that the house belonged to him, and that the defendants so understood. If, however, the circumstances under which the lease was made were such as the defendants offered to show, the effect of the alleged admission would be materially lessened. The lease was not admitted to estop the defendant from denying Eldridge's title, but merely as an admission against interest. Its value as such would necessarily depend upon the circumstances under which it was made, and the reasons which prompted its execution by the defendants. The evidence offered was

therefore admissible, and for the error in excluding it the judgment must be reversed.

In view of another trial, it is deemed proper to indicate briefly the opinion of the court upon some other points in the case.

2. A contention is made that the motion for a nonsuit should have been allowed, because the action was not commenced within a reasonable time after the repudiation by the defendants of the alleged contract for the leasing of the premises to plaintiff, and an extension of time for redemption thereof from the sale under the foreclosure decree. Under our statute a purchaser of real property at execution sale is entitled to possession thereof from the day of sale until a resale or redemption, unless it is in possession of a tenant holding under an unexpired lease: B. & C. Comp. § 253. The agreement, therefore, between the plaintiff and the defendants, if made, that plaintiff might remain in possession of the premises, paying rent therefor, for two years after the time for redemption had expired, with the right to redeem within such time, would constitute the relation of landlord and tenant between them.

3. If the contract was wrongfully terminated by the defendants, and the plaintiff ousted, he would be entitled to a reasonable time thereafter in which to reënter and remove improvements put on the premises by him, if it could be done without substantial injury to the freehold: Gear, Land. & Ten. § 116; *Central Branch R. Co. v. Fritz*, 20 Kan. 430 (27 Am. Rep. 175); *Commissioners of Rush County v. Stubbs*, 25 Kan. 312; *Turner v. Kennedy*, 57 Minn. 104 (58 N. W. 823); *Waters v. Reuber*, 16 Neb. 99 (19 N. W. 687, 49 Am. Rep. 710); *Ombony v. Jones*, 19 N. Y. 234; *Meador v. Brown*, 5 New York St. Rep. 839. What constitutes a reasonable time in which a tenant may remove a fixture after the tenancy has been wrongfully

terminated by the landlord is to be determined from the facts and circumstances of each case, and the conduct of the respective parties. The question is not involved here, however, nor the right of the plaintiff to remove the house from the premises, if it belonged to him.

4. The action is in trover, for an unlawful conversion of the house by the defendants. The evidence tended to show that plaintiff never intended to abandon the building, but promptly asserted his claim thereto; that his title and right to the possession was denied by the defendants, who wrongfully and unlawfully entered and took possession of the premises before the expiration of the lease, forbade the removal of the hophouse, and converted the same to their own use. Under such circumstances, a tenant may maintain an action of trover against his landlord: *Rosenau v. Syring*, 25 Or. 386 (35 Pac. 844).

5. And his right of action is not barred until the general statute of limitation interposes: *Porter v. Foster*, 20 Me. 391 (37 Am. Dec. 59).

6. This action was brought and tried on the theory, apparently accepted by all parties until this appeal, that, if plaintiff was entitled to recover, the measure of damages would be the reasonable rental value of the house while it remained on the premises of the defendants. The action is in trover. In such an action the rule for the measure of damages is well understood. The title to the property alleged to have been converted is regarded as having passed to the defendant, who is liable for its value, with simple interest. The measure of damages, therefore, in an action of trover, unless plaintiff, by reason of the unlawful act of the defendant, has suffered some special loss or injury, which must be alleged, is the value of the property at the time of the conversion, with interest thereon to the trial (4 Sutherland, Damages, 3 ed. § 1109; 2 Sedgwick, Damages, 8 ed. § 493; Field, Damages, § 792; Eg-

gleston, Damages, § 288), unless, perhaps, the property is of a fluctuating value, when, under some of the authorities, the highest value at any time between the conversion and the trial will be taken as a basis for estimating the damages. See 2 Sedgwick, Damages, (8 ed.) § 597, *et seq.*; Field, Damages, § 798, *et seq.*

It is argued, however, that this rule does not apply where the property has been returned to and accepted by the plaintiff, but in such cases the true measure of damages is the value of the use of the property during the time it was in the possession of the defendant, and there are some authorities to that effect: *Ewing v. Blount*, 20 Ala. 694; *Fields v. Williams*, 91 Ala. 502 (8 South. 349). This position, it seems to us, overlooks the fundamental principle underlying an action of trover. It is based upon the theory that by the conversion the title to the property passes to the defendant, and he is liable for its value. The subsequent return to and acceptance of the property by the owner is admittedly no bar to an action of trover for its conversion, but goes only in mitigation of damages: *Murphy v. Hobbs*, 8 Colo. 17 (5 Pac. 637); *Curtis v. Ward*, 20 Conn. 204; *Bigelow County v. Heintze*, 53 N. J. Law, 69 (21 Atl. 109); *United States v. Pine River L. & I. Co.* 78 Fed. 319 (24 C. C. A. 101). Now, if an action may be maintained against the wrongdoer for the conversion, notwithstanding the return to the owner of the property unlawfully converted, it follows as a logical sequence that in such action the accepted rule for the measure of damages in an action of trover must be applied, the return of the property going only in mitigation of such damages. It is accordingly held by the better authorities that, in case of a return of property, the measure of damages in an action of trover for its conversion, when special damages are not alleged, will, in general, be the value of the property at the time of the conversion, with interest thereon to the trial,

less its value at the time of the return, with interest thereon from that date, and not the value of its use during the time it was in the possession of the defendants: 26 Am. & Eng. Enc. Law (1 ed.) 851; 4 Sutherland, Damages (3 ed.) § 1159; 2 Sedgwick, Damages (8 ed.) § 494; *Gove v. Watson*, 61 N. H. 136; *Flagler v. Hearst*, 86 N. Y. Supp. 308. *Gove v. Watson*, 61 N. H. 136, was an action in trover for the conversion of oxen which had been returned and accepted by the plaintiff. During the time defendant had possession of the oxen, he worked them without plaintiff's knowledge or consent. The plaintiff sought to recover the value of such work as an item of damages, but the court held that the measure of damages was the difference between the value of the oxen at the time of the conversion and their value at the time they were retaken by the plaintiff. *Flagler v. Hearst*, 86 N. Y. Supp. 308, was an action to recover damages for the conversion of a steam yacht, which was returned to the plaintiff before the action was tried. The trial court submitted to the jury as the measure of damages the fair rental value of the yacht during the time it was in the possession of the defendant, but the supreme court held that the true measure of damages was its value at the time of its conversion, with interest added, less its value at the time of the return, with interest on that sum, and that it was error to submit to the jury the question as to the value of its use during the time it was in the possession of the defendant.

The judgment will be reversed, and a new trial ordered.

REVERSED.

Argued 8 June, decided 1 August, 1904.

UNITED BRETHREN v. AKIN.

[77 Pac. 748, 66 L. R. A. 654.]

LIABILITY OF EXECUTOR FOR DEBT DUE TO DECEDENT.*

1. Under Section 1144, B. & C. Comp., providing that an executor of an estate shall be liable for any claim of the testator against him, "as for so much money in his hands," a debt of the executor of an estate on a note executed to the testator in his lifetime should be charged as so much money in the hands of the executor on the settlement of his final account, though the executor at the time of and after his appointment was unable to pay the note.

LIMIT OF LIABILITY OF SURETIES ON EXECUTOR'S BOND.

2. The sureties on the bond of an executor are liable when and as he is with reference to the property coming into his hands, and a decree of the probate court that binds the principal will equally bind the sureties, unless for fraud or collusion.

EXECUTOR'S PERSONAL DEBT TO DECEDENT—LIABILITY OF SURETIES.

3. The sureties on an executor's bond, though they executed it without any knowledge of indebtedness by the executor to the decedent, or of the executor's insolvency, are still liable for the amount of such personal debt by the executor.

EXECUTOR'S FRAUD THAT WILL RELEASE SURETIES.

4. Fraud that will release the sureties on an executor's official bond must be fraud in which the beneficiaries seeking to enforce the liability were themselves participants.

From Benton: JAMES W. HAMILTON, Judge.

This is an action by the United Brethren First Church of Eugene against J. L. Akin and the sureties on his official bond as an executor to recover the amount decreed by the probate court as due on its claim against the estate of which Akin had charge. Further facts appear in the opinion. There was a judgment for plaintiff and defendants appeal.

AFFIRMED.

For appellant there was an oral argument by *Mr. J. R. Wyatt*, with a brief over the name of *Weatherford & Wyatt*, to this effect.

I. We contend that the sureties on the executor's bond are not liable for the personal debt of the executor to the

*NOTE—As to the liability of executors and administrators and their sureties for personal debts to their decedents see *Estate of Walker*, 72 Am. St. Rep. 40, 46; *Arnold v. Arnold*, 82 Am. St. Rep. 199, 204, and *Re Estate of Howell*, 61 L. R. A. 313.

deceased where it appears that they had no personal knowledge of its existence at the time of signing the bond, and that the executor was insolvent during the entire period of administration, and that the debt remained uncollected was not his fault or that of his sureties: *Re Howell's Estate*, 66 Neb. 575 (61 L. R. A. 313, 92 N. W. 760); *Condit v. Winslow*, 106 Ind. 142 (5 N. E. 571); *State ex rel. v. Gregory*, 119 Ind. 503 (22 N. E. 1); *Gottsberger v. Smith*, 5 Duer, 566; *Baucus v. Stover*, 89 N. Y. 1; *Harker v. Irrick*, 10 N. J. Eq. (2 Stockt. Ch.) 269; *Re Walker's Estate*, 125 Cal. 242 (72 Am. St. Rep. 40, 57 Pac. 991); *Garber v. Commonwealth*, 7 Pa. St. 265; *Re Pipes' Estate*, 15 Pa. St. 533; *Lyon v. Osgood*, 58 Vt. 707 (7 Atl. 5); *McCarthy v. Frazier*, 62 Mo. 263, 265; 2 Sutherland, Damages, § 495.

II. It is contended here that the final decree in probate is conclusive in the absence of fraud, but the mere fact that the executor did not disclose to the sureties his indebtedness amounts to a fraud: *Harker v. Irrick*, 10 N. J. Eq. (2 Stockt. Ch.) 269.

For respondent there was an oral argument and a brief by *Mr. Edward R. Bryson*, to this effect.

1. A decree settling the final accounts of an executor and distributing the estate is conclusive on the sureties on the executor's bond, in the absence of fraud or collusion, as to all property chargeable to the principal in his official capacity: *Bellinger v. Thompson*, 26 Or. 320, 343 (37 Pac. 714, 40 Pac. 229); *Thompson v. Dekum*, 32 Or. 506, 516 (52 Pac. 517); *Stovall v. Banks*, 77 U. S. (10 Wall.) 583; *Greer v. McNeil*, 11 Okl. 519 (69 Pac. 891, 898); *Judge of Probate v. Sulloway*, 68 N. H. 511 (49 L. R. A. 347, 73 Am. St. Rep. 619, 44 Atl. 720); *Treweek v. Howard*, 105 Cal. 434 (39 Pac. 20); *Re Walker's Estate*, 125 Cal. 242 (73 Am. St. Rep. 40, 57 Pac. 991); *Bassett v. Fidelity & Deposit Co.* 184 Mass. 210 (100 Am. St. Rep. 552, 68 N. E.

205); *Garber v. Commonwealth*, 7 Pa. St. 266; Woerner, Am. Adm'n, § 255; Abbott, Trial Ev. § 23; 11 Am. & Eng. Enc. Law (2 ed.), 901.

2. Fraud, to constitute a defense for the sureties, must be the fraud of the one seeking to enforce the bond: 1 Woerner, Law of Adm'n, § 255; *Treweek v. Howard*, 105 Cal. 434 (39 Pac. 20); *McGaughey v. Jacoby*, 54 Ohio St. 487 (44 N. E. 231).

3. Under such a statute as ours the executor's debt becomes an official liability the discharge of which is insured by the bond, and the executor's inability to pay is not a defense for the sureties on his bond: *Lambrecht v. State, to Use*, 57 Md. 240; *Judge of Probate v. Sulloway*, 68 N. H. 511 (49 L. R. A. 347, 73 Am. St. Rep. 619, 44 Atl. 720); *Tracy v. Card*, 2 Ohio St. 449, 452; *McGaughey v. Jacoby*, 54 Ohio St. 487 (44 N. E. 231); *James v. West*, 67 Ohio St. 28 (65 N. E. 156); *Treweek v. Howard*, 105 Cal. 434 (39 Pac. 20).

4. Independent of statute the same rule prevails on grounds of public policy and justice: *Leland v. Felton*, 1 Allen, 531; *Bassett v. Fidelity & Deposit Co.* 184 Mass. 210 (100 Am. St. Rep. 552, 68 N. E. 205); *Modawell v. Hudson*, 57 Ala. 75; *Wright v. Land*, 66 Ala. 389; *Succession of Bailey*, 30 La. Ann. 75; *Twitty v. Houser*, 7 S. C. 163; *Todd v. Davenport*, 22 S. C. 147.

MR. JUSTICE BEAN delivered the opinion of the court.

1. This is an action by the United Brethren First Church, of Eugene, a creditor of the estate of Peter W. and Hannah R. Mason, deceased, against J. L. Akin, as executor of such estate, and the sureties on his official bond, to recover the amount due plaintiff under the decree of final settlement and distribution. Akin was indebted to the estate in the sum of \$830 and interest on a promissory note executed and delivered by him to Peter W.

Mason in his lifetime. At the time of his appointment as executor he was insolvent, and has ever since so continued, and is unable to pay the note. He was, nevertheless, properly charged, under Section 1144, B. & C. Comp., (which was Section 1117 of Hill's Ann. Laws), on his final settlement, with the amount of such note and interest, as "so much money in his hands," and the amount was included in the order of distribution: *Mason's Estate*, 42 Or. 177 (70 Pac. 507, 95 Am. St. Rep. 734).

2. The single question on this appeal is whether the sureties on his official bond, who executed the same without knowledge of his indebtedness or his insolvency, are liable under the decree of final distribution for the amount of his personal debt to the estate. In our opinion, there can be but one answer to the question. It is common learning that the liability of the sureties of an executor is coextensive with that of the principal, and a decree of the county or probate court which binds the principal will, in the absence of fraud or collusion, bind them: *Bellinger v. Thompson*, 26 Or. 320, 343 (37 Pac. 714, 40 Pac. 229); *Thompson v. Dekum*, 32 Or. 506, 516 (52 Pac. 517, 755); 11 Am. & Eng. Enc. Law (2 ed.) 901; Abbott, Trial Ev. (2 ed.) 638; Abbott, Probate L. & Prac. § 538; *Greer v. McNeil*, 11 Okl. 519 (69 Pac. 891); *Stovall v. Banks*, 77 U. S. (10 Wall.) 583.

3. It follows that when an executor has been charged upon the settlement of his accounts with a personal debt which he owed the deceased, whether by virtue of a statute, as in this State, or without a statute, as in other jurisdictions, the sureties on his bond are bound for the payment thereof, and the executor's insolvency or inability to pay is no defense, and so are the adjudged cases. *Judge of Probate v. Sulloway*, 68 N. H. 511 (44 Atl. 720, 49 L. R. A. 347, 73 Am. St. Rep. 619), was an action on an executor's bond to recover the amount decreed to

be in the hands of the executor upon final settlement, which account included a debt due from him to the estate. The executor was insolvent when appointed, and continued so, but it was held, nevertheless, that the amount of his debt was, under the statute of that State, properly charged to him as "so much cash on hand," and that his bondsmen were bound by the decree; the court saying: "The liability of the sureties is coextensive with that of the principal. They are his privies. By whatever decree of the probate court their principal is bound, they are bound. This is because they have, in legal effect, so stipulated in the bond. It necessarily follows that they are bound to whatever, in law, their principal, the executor is bound. That he is bound to account for his indebtedness to the testator is not questioned, nor is it claimed that he is relieved from this obligation by the fact that he is insolvent or unable to pay."

In Massachusetts, an executor, though insolvent, is chargeable on final settlement with the amount of a debt due from him to the deceased, without a statute, as though "he had actually received so much money": *Stevens v. Gaylord*, 11 Mass. 256. In *Bassett v. Fidelity & Deposit Co.* 184 Mass. 210 (100 Am. St. Rep. 552, 68 N. E. 205), the court was asked to hold that, although an executor was so chargeable, the sureties on his official bond were not liable, but it said: "That is out of the question. That contention flies directly in the face of the elementary principles governing the effect of a decree allowing a probate account, and the elementary principles as to the obligation of a surety on a probate bond. In the first place, a decree of a probate court allowing an account of an executor or other official is binding on all interested in the estate, including sureties on the bond of the accountant. * * In the second place, the obligation of a surety on a probate bond is the obligation of the principal. The bond

is a joint bond, and the judgment necessarily must be the same against both. This is more than a technical rule of law. It is a place where the true character of a surety's liability comes to the surface. The ground on which it was held that a surety has a right of appeal in such a case was that the decree settling the account of the principal, 'if once properly established, fixes the amount of liability of the sureties on their bond.' And ENDICOTT, J., in *Tarbell v. Jewett*, 129 Mass. 457, 468, speaking of *Leland v. Felton*, 1 Allen, 531, said that it was held that the executor would be charged for his own notes and for the notes of his firm held by the testator, although both he and the firm were insolvent, 'which, of course, rendered his sureties liable.'"

California has a statute in reference to the liability of executors similar to ours. *Treweek v. Howard*, 105 Cal. 434 (39 Pac. 20), was an action on an executor's bond based on a decree of final settlement, in which the executor had been charged with a large amount of money which he had embezzled during the lifetime of the deceased. It was held that the sureties were liable, and that "the decree of distribution entered in the superior court, and the order of such court in passing upon and approving the account of the executor, were, in the absence of fraud, binding upon the executor and his sureties, although the latter were not parties to the proceeding." These cases are but the necessary application of the general doctrine that the sureties of an executor or administrator are bound by the decree against their principal. To the same effect are *Wright v. Lang*, 66 Ala. 389; *Lambrecht v. State, to Use*, 57 Md. 240; and *McGaughey v. Jacoby*, 54 Ohio St. 487 (44 N. E. 231).

Baucus v. Barr, 45 Hun, 582, affirmed on appeal, without an opinion, in 107 N. Y. 624 (13 N. E. 939), is the only decision to which our attention has been called, or which

we have been able to find, holding a contrary doctrine. It stands alone, and not only disregards or overlooks the rule recognized and enforced in that State that a decree against an executor, in the absence of fraud or collusion, is binding on the sureties (*Gerould v. Wilson*, 81 N. Y. 573; *Harrison v. Clark*, 87 N. Y. 571), but it is also against the great weight of authority as to the liability of the sureties of an executor for a personal debt of their principal, under a statute like ours. See cases cited in *Mason's Estate*, 42 Or. 177 (70 Pac. 507, 95 Am. St. Rep. 734). The *Estate of Walker*, 125 Cal. 242 (57 Pac. 991, 73 Am. St. Rep. 40), was an appeal from a decree of final settlement of an administrator, and is not in point. We are therefore of the opinion that under the statute of this State, and by the great weight of authority, the sureties on the official bond of Akin as executor of the Mason estate are liable for the amount of his personal debt to the estate, notwithstanding his insolvency. The fact that they executed the bond in ignorance of the indebtedness or of his insolvency is no defense for them, or ground for relief, legal or equitable.

4. The sureties on an executor's bond will not be discharged from liability, even by the fraud of the executor in procuring their execution of the bond, when the beneficiaries of the estate in whose interest the liability is sought to be enforced are themselves innocent of the fraud: *Treweek v. Howard*, 105 Cal. 434 (39 Pac. 20); *McGaughey v. Jacoby*, 54 Ohio St. 487 (44 N. E. 231).

The conclusion reached may in some respects be a harsh one, and impose on the sureties a liability which they did not suppose themselves assuming. The statute fixing the liability of their principal was, however, a part of the law of the State at the time the bond was executed, they must be presumed to have executed it with reference thereto, and, as said in *Treweek v. Howard*, 105 Cal. 434 (39 Pac.

20), "are as liable as they would have been, had section 1447 been incorporated in the bond." The judgment is therefore affirmed. AFFIRMED.

Decided 27 June, 1904.

GOLTRA v. PENLAND.*

[77 Pac. 129.]

45	254
46	26
146	238
147	583

AGENCY—ADMISSIONS OUTSIDE SCOPE OF AUTHORITY.

1. The statements of an agent, to be binding upon the principal, must have been made on a subject within the scope of the agent's authority, and at a time when that subject was being considered: for instance, in an action for conversion of sheep by one caring for them on shares, declarations of a person who delivered wool for defendant to a warehouseman as to the ownership of the sheep from which the wool was clipped were outside the scope of such person's authority as agent, and were inadmissible, he being employed simply to haul the wool to the warehouse.

WITNESSES—CROSS-EXAMINATION.

2. Where, in an action against an executrix, her attorney, on direct examination, testified for plaintiff as to the presentation of the claim for allowance, it was not proper cross-examination to elicit testimony as to a conversation between said attorney and the decedent in which decedent had denied being indebted to plaintiff, as B. & C. Comp. § 849, permits cross-examination only as to any matter stated in direct examination or connected therewith.

PRESENTING CLAIM TO EXECUTOR—EFFECT OF FAILURE TO ACT ON CLAIM.

3. Under B. & C. Comp. § 388, providing that no action shall be commenced against an executor until the claim has been presented and disallowed, and that if the executor does not pass on such claim within a reasonable time it will be deemed disallowed, the failure to act is equivalent to a rejection, and an instruction that a refusal to act amounts to a rejection is erroneous, there being a difference between failing to act and refusing to do so.

PRESENTING CLAIM TO EXECUTOR—DETERMINATION OF REASONABLE TIME.

4. The determination of what is a reasonable time to pass upon a claim presented against an estate is a question for the court where the time of presentation is admitted and no explanation is given for the delay.

WHAT IS A REASONABLE TIME TO PASS ON A CLAIM AGAINST AN ESTATE.

5. In the absence of some explanation, six months is a reasonable time for an executor to act on a claim presented against an estate, and the court should so declare.

EVIDENCE OF PRESENTATION OF CLAIM—STATUTES.

6. Section 1161, B. & C. Comp., providing that no claim which shall have been rejected by the executor or administrator shall be allowed, except upon some competent or satisfactory evidence other than the testimony of the claimant, applies only to the trial on the merits of a rejected claim, and not to the preliminary question as to whether there was due presentation and disallowance within a reasonable time.

*NOTE.— For the opinion on a previous appeal see 42 Or. 18.

EVIDENCE TO SUPPORT REJECTED CLAIM AGAINST AN ESTATE—STATUTES.

7. Section 1161, B. & C. Comp., prohibiting the allowance of a rejected claim against an estate "except upon some competent or satisfactory evidence other than the testimony of the claimant," does not mean that the other evidence aside from the testimony of the claimant must of itself be sufficient, but only that there must be other material and pertinent testimony supporting that given by claimant, sufficient to go to the jury, and on which it might find a verdict.

CONVERSION—FACTS TO BE PROVED.

8. In an action for conversion of a share of a band of sheep, plaintiff claiming that defendant had had a number of sheep belonging to him, caring for them on shares, and that a settlement was had, determining the number of sheep belonging to plaintiff, and the lease extended for another year, during which time defendant converted the sheep, it was incumbent on plaintiff to prove either that at the time of settlement the testator had sheep belonging to plaintiff, or, if he had none, that others were selected and identified in some way in lieu of them.

From Morrow: WILLIAM R. ELLIS, Judge.

Action by W. H. Goltra, executor of the estate of Hugh Fields, deceased, against Jane Penland, executrix of the estate of William Penland, deceased. This action was commenced September 28, 1901, by Hugh Fields against the executrix of the estate of William Penland, deceased, to recover the value of certain sheep alleged to have been converted by Penland to his own use. The complaint alleges, in substance, that for several years prior to June 1, 1900, Penland had in his possession a band of ewe sheep, the property of Fields, which he had been keeping on the shares; that, on or about the day named, he and Fields had an accounting and settlement as to such sheep, and it was ascertained and agreed between them that Penland then had in his possession 2,888 head of ewes and 821 lambs belonging to Fields, which he was to keep on shares for another year, and then return them to Fields, together with his share of the wool and increase; that, in pursuance of such agreement, Penland retained possession of the sheep until November, 1900, when, without the knowledge or consent of Fields, he wrongfully and unlawfully sold and disposed of them, and appropriated the proceeds to his own use, to the plaintiff's damage in the sum of \$10,306; that Penland died in February, 1901, and defendant was duly appointed executrix

of his estate; that on April 18, 1901, Fields duly presented to her his claim for the value of the sheep so converted by her testator, but she has refused to pass upon the same, and has, therefore, in law, rejected it. Fields died in November, 1901, and the plaintiff, having been appointed his executor, was duly substituted in his place. Thereafter the defendant answered, denying the material allegations of the complaint, except the death of Penland and her appointment as executrix, and affirmatively alleging that on or about the 1st of April, 1901, the plaintiff pretended to present to her an alleged claim against the estate of her decedent, and that she has retained the same for investigation, but has neither allowed nor rejected it. For a further and separate defense, it is alleged that in 1897 Penland had in his possession about 800 sheep belonging to Fields, which at the latter's request he sold, and that he accounted to him for the proceeds in full. The cause was tried before a jury, resulting in a verdict and judgment for the defendant, and the plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *Chas. E. Redfield* and *Hewitt & Sox*, with an oral argument by *Mr. Henry H. Hewitt*.

For respondent there was a brief over the names of *G. W. Phelps* and *Huntington & Wilson*, with an oral argument by *Mr. Phelps* and *Mr. Hollis S. Wilson*.

MR. JUSTICE BEAN, after stating the facts in the above terms, delivered the opinion of the court.

1. Phil Cohn, a warehouseman, testified that in the years 1899 and 1900 one Lassen delivered wool at his warehouse for the account of Penland, which Penland afterwards said belonged to Fields. The witness was thereupon asked to relate any conversation he had with Lassen at the time the wool was delivered in 1900 about its coming from

Fields' sheep, counsel stating that he expected to prove by the witness that Lassen said it was Fields' share of the wool clipped from the sheep belonging to him, which Penland was running on the shares. An objection to the evidence was sustained, and, we think, properly. There was no testimony that Lassen was the agent of Penland for any purpose, unless it is to be inferred from the fact that he delivered the wool at the warehouse, and that would not be sufficient to make his declarations as to the title or ownership of the wool competent evidence against Penland: *Zorn v. Livesley*, 44 Or. 501 (75 Pac. 1057). Where the act of an agent will bind his principal, his declarations in respect to the subject-matter, if made at the time and forming a part of the transaction, are competent against the principal; but, if the declarations are concerning a matter not within the scope of the agent's authority, the principal is not affected by them in any way, even though they may be made at a time when the agent is lawfully transacting some business for him: *North Pac. Lum. Co. v. Willamette Mill Co.* 29 Or. 219 (44 Pac. 286); *First Nat. Bank v. Linn County Bank*, 30 Or. 296 (47 Pac. 614); *Wicktorwitz v. Farmers' Ins. Co.* 31 Or. 569 (51 Pac. 75); *Van Vechten v. Smith*, 59 Iowa, 173 (13 N. W. 96); 1 Greenleaf, Evidence (14 ed.) § 114. Lassen, if he was an agent of Penland at all, had no authority to deal with the wool in any way except to deliver it at the warehouse, and any statements or declarations he may have made as to the title or ownership were entirely outside the scope of his authority, and did not explain or characterize any act he was authorized to perform by virtue of his employment.

2. G. W. Phelps, one of the attorneys for the defendant executrix, was called by the plaintiff for the purpose of proving due presentation of the claim sued upon. On his

examination in chief, he testified that a certain identified claim was presented to him by Fields about the time it was made out, but no questions were asked him concerning any conversations he had with Fields at the time, nor did he testify on that subject. On cross-examination, however, he was allowed to testify that at the time the claim was presented he told Fields that Penland said he did not have any sheep belonging to him, and also: "I told Mr. Fields, among other things, that Mr. Penland, about the time that this Penland Livestock & Land Company, a corporation [was formed]—that, when the question came up as to turning over all the property to this new corporation, I asked him whether or not he had any sheep belonging to Mr. Fields, and Penland at that time said 'No,' and made some such remark as that 'The old fool is crazy. I don't owe him a cent.'" This was not proper cross-examination, and, the evidence itself being incompetent and obviously injurious to the plaintiff, the motion to strike it out should have been sustained. The right to cross-examine a witness is a valuable one, and should not be unnecessarily restricted, yet it must be limited to matter stated by the witness on his direct examination, or be connected therewith. A witness cannot upon cross-examination be questioned with regard to that which does not tend to impeach, rebut, explain, modify, or in some way qualify anything he has testified to on his examination in chief. He can only be examined on other matters by the examining party making him his own witness. The statute provides: "The adverse party may cross-examine the witness as to any matter stated in his direct examination, or connected therewith": B. & C. Comp. § 849. "Under this statute," says this court in *Ah Doon v. Smith*, 25 Or. 89, 93 (34 Pac. 1093, 1094), "and the rule there provided, a party has no right to cross-examine a witness except as to facts and circumstances stated on his

direct examination, or connected therewith; but, within this limitation, great latitude should be allowed in conducting the examination. It should not be limited to the exact facts stated on the direct examination, but may extend to other matters which tend to limit, explain, or qualify them, or to rebut or modify any inference resulting therefrom, provided they are directly connected with the matter stated in the direct examination." See, also, to the same effect, *Sayres v. Allen*, 25 Or. 211 (35 Pac. 254); *Williams v. Culver*, 39 Or. 341 (64 Pac. 763); *Rapalje, Witnesses*, § 246. Now, the only fact in this regard testified to by Phelps on his direct examination was that a certain verified claim of Fields against Penland's estate had been presented to the executrix, through him, for allowance. The plaintiff did not ask for any conversation between the witness and Fields, nor did he offer to show any declaration of either of the parties. He simply sought to prove by the witness that the claim had in fact been presented. The evidence elicited on cross-examination as to what the witness told Fields at the time about Penland's statements concerning the subject-matter of the claim was in no way connected with the proof of its presentation; nor did it tend to limit, qualify, rebut, or explain in any manner the direct examination. It was therefore not proper cross-examination, and, as the evidence was otherwise incompetent, and obviously injurious to the plaintiff, it cannot be said that the error was harmless.

3. The court instructed the jury:

"In order to recover in an action of this sort against the executrix of the last will and testament of a deceased person, the plaintiff must allege and prove, among other things, that he presented his claim for the demand sued upon, and that the same was rejected, before action was commenced; but the refusal of the executrix to act upon

such claim, if you find from the evidence she did so refuse, after having the same in her possession for a reasonable time, and did neither approve or reject the same, nor take action thereon, such action on her part would amount to a rejection of the claim."

Objection was made to this instruction because "it failed to state what a reasonable time is, and is not a correct statement of the law applicable to the case." The instruction, we think, is erroneous for two reasons: It made the question of the rejection of the claim depend upon the refusal of the executrix to act upon it, when a mere failure or neglect to do so would have been sufficient; and it left the determination of what was a reasonable time after the presentation of the claim in which to allow or reject it as a question of fact for the jury. The statute provides that no action shall be commenced against an executor or administrator until the claim of the plaintiff has been presented and disallowed (B. & C. Comp. § 388), but if the administrator neither allows nor rejects the claim within a reasonable time after its presentation, it will be deemed disallowed, and the creditor may bring an action thereon: 2 Woerner, Administration, (2 ed.), § 390; 1 Abbott, Probate Law, § 473. The executor or administrator has a reasonable time after the presentation of a claim against the estate of his decedent in which to examine it and determine whether he will allow or reject it, but, if he fails to do either within such time, the claim will, in law, be disallowed, and it is immaterial whether his failure to act is due to an affirmative refusal or not. For this reason the language of the instruction was at least technically inaccurate, and may have misled the jury.

4. The more serious objection to the instruction, however, is that it left the question whether the defendant had a reasonable time after the presentation of the claim in which to allow or reject it as one of fact for the jury.

The complaint alleges that the claim was presented to the executrix for allowance on the 18th of April, 1901, and the answer says that it was presented on or about the first of that month. The action was commenced September 28th following, so that it is admitted by the record that it was almost six months from the time of the presentation of the claim to the commencement of the action; and, as there was no reason offered by the defendant for her delay in not passing upon the claim, the question as to whether she had had a reasonable time in which to do so was for the court, and not for the jury. "Generally, what is a reasonable time," says Mr. Justice STRAHAN, in *Fleischner v. Kubli*, 20 Or. 328 (25 Pac. 1086), "when the facts are undisputed, is a question of law for the court." The same rule is stated by Mr. Justice WOLVERTON in *Howell v. Johnson*, 38 Or. 571 (64 Pac. 659).

5. It is undisputed that the claim was presented to the executrix by the 1st of April, and was in her possession six months later, when the action was commenced. This was clearly a reasonable length of time in which to determine whether she would allow or reject it. The court should have so declared as a matter of law, and not left the question for the jury. In *Willis v. Marks*, 29 Or. 493 (45 Pac. 293), a claim against an estate was presented to the administrator on the 8th of January, a demand for its return made by the claimant on the 9th of the following April, and an action of replevin commenced about two months thereafter; and the court held that the administrator was entitled to hold the claim a reasonable length of time after its presentation for examination, to determine whether it should be allowed or rejected, but that a reasonable time had elapsed, and plaintiff could therefore maintain an action of replevin to recover possession thereof.

6. The deposition of Hugh Fields was taken prior to his

death, and read on the trial. He testified, among other things, that the last of April or the first of May, 1901, he presented to Mr. Phelps, the attorney for the executrix, for allowance, a verified claim sued upon, and that he subsequently endeavored to get the executrix to pass upon it, but could not do so. The court instructed the jury that they "must not find for the plaintiff upon any point, except there is competent or satisfactory testimony other than the deposition of the claimant, Hugh Fields, and this is true even though you should believe the testimony of Fields upon said point." The questions as to whether the claim sued upon had been presented to the executrix and rejected by her, or had been retained an unreasonable length of time, were submitted to the jury; and, under this instruction, they were, in effect, told that they could not find in favor of the plaintiff upon such issues, except upon some evidence other than that of Fields, even though they should believe his testimony. This we conceive to be an erroneous construction of section 1161 of the statute, which provides that, when a claim has been presented to an executor or administrator, he shall indorse thereon the words "Examined and approved," with the date thereof, and sign the same officially, if he is satisfied that the claim is just; if not, he shall indorse thereon the words "Examined and rejected," with the date thereof, and sign the same officially, and that "no claim which shall have been rejected by the executor or administrator, as aforesaid, shall be allowed by any court, referee, or jury, except upon some competent or satisfactory evidence other than the testimony of the claimant." The purpose of this statute is apparent. It is to protect the estates of deceased persons against false and fraudulent claims, and to guard against false testimony. The death of a contracting party often renders it difficult, if not impossible, for his representative to show the invalidity of a claim against his

estate, or to defend against it; and therefore the statute has provided that, when the lips of one party are closed by death, the testimony of the survivor shall not be sufficient alone to establish a claim against the estate of the deceased. Before an action can be brought against an executor to establish a liability against the estate, however, it must be shown that the claim has been duly presented to him and disallowed, or that he has retained it an unreasonable length of time, and the statute referred to can have no application to a trial of this preliminary question. It is only on the trial of the merits of a rejected claim that it can apply. The issue as to whether the claim has been presented and rejected is not within the purpose of the statute, or the mischief intended to be remedied. It is an issue to be determined from the testimony of living witnesses, to be tried out as any other question of fact, and decided upon the preponderance of the evidence. When it comes to the trial of the merits, the statute applies. It must be first shown, however, that the claim has been presented to the executrix and rejected by her, and this can be done by any evidence satisfactory to the trier of fact. The statute says that no claim which has been rejected, etc., shall be allowed, except upon a certain character of proof, but it says nothing about the proof necessary to establish the preliminary issue of the presentation and rejection of the claim.

7. The meaning of the statute when it applies is not easy to determine. It provides that a claim which has been disallowed by an executor shall not be allowed by any court or jury, except upon some "competent or satisfactory" evidence other than the testimony of the claimant. Whether this means that the claim shall not be allowed unless the testimony of the claimant is corroborated by other pertinent and competent testimony, or whether his evidence shall be entirely disregarded and the claim dis-

allowed unless there is other evidence in the case sufficient to satisfy the trier of fact of the justness of the claim, is the important question. The language of the statute is contradictory. It says the evidence shall be competent or satisfactory, and these terms are not, in law, synonymous. By "competent evidence" is meant that which the nature of the fact to be proved requires—such as the production of a writing when its contents are the subject of inquiry: 1 Greenleaf, Evidence, (14 ed.) § 2. Satisfactory evidence, on the other hand, is that evidence which ordinarily produces moral certainty or conviction in an unprejudiced mind (B. & C. Comp. § 688), or, as Mr. Greenleaf says, such as "ordinarily satisfies an unprejudiced mind beyond reasonable doubt": 1 Greenleaf, Evidence, (14 ed.) § 2. Evidence may therefore be competent, and not satisfactory. And it may be satisfactory to the trier of fact, and not be competent—such as secondary evidence of the contents of a writing, without the writing itself being accounted for. The statute, therefore, cannot mean that evidence other than that of the claimant, either competent or satisfactory, will be sufficient to establish the claim. Competent evidence would be such merely as the nature of the case requires, and might be very slight and insufficient, while satisfactory evidence would require proof to a moral certainty, if not beyond a reasonable doubt, and that is more than the law requires in a civil case. The statute, therefore, must be construed according to its spirit and purpose, and the evil sought to be remedied, rather than the technical meaning of the words used. Looking at it from this standpoint, and keeping in full recognition its purpose, which is to avoid the injustice which might follow from the allowance of a claim against the estate of a deceased person on the testimony of the claimant alone, the reasonable interpretation seems to be that the testimony of the claimant is not sufficient, but

there must be other material and pertinent testimony supporting or corroborating that given by him, sufficient to go to the jury and upon which it might find a verdict, so that the decision may rest upon some evidence other than that of the claimant. This is substantially the construction of the statute indicated in *Quinn v. Gross*, 24 Or. 147, 151 (33 Pac. 535), and *Harding v. Grim*, 25 Or. 506 (36 Pac. 634), although in neither of these cases was the direct question presented. It was evidently not intended by the legislature that the evidence of the claimant should be entirely ignored or disregarded. If such had been the purpose, it would have been so provided. In many of the states, when one of the contracting parties to a litigated obligation is dead, the other is not permitted to testify: 1 Wharton, Evidence, (2 ed.) § 466; 2 Woerner, Administration, (2 ed.) § 398; Bradner, Evidence, § 14. Our statute, however, does not go to that extent. The claimant in an action against an estate is a competent witness in his own behalf (B. & C. Comp. § 722), but his testimony is not of itself sufficient to establish his claim. Section 1161 is practically an enactment of the English equity rule, which is that "a pecuniary demand against the estate of a deceased person will not be considered and established by the oath of the person making such claim, unsupported by any other evidence": Wharton, Evidence, (2 ed.) § 467.

8. The remaining assignments of error are based upon instructions given. It is unnecessary to set out the instructions in full, or to notice them in detail, for they are lengthy and would unnecessarily encumber this opinion, and many of the questions involved have already been disposed of. The only point remaining to be noticed is the instruction to the effect that plaintiff could not recover in this action unless Penland, at the time of the alleged settlement between himself and Fields in May,

1900, had in his possession sheep belonging to Fields, or unless certain sheep were then set aside and appropriated to the contract, so that they could be identified, and Penland thereafter converted them to his own use. In other words, that if Penland had, prior to the alleged settlement, sold and disposed of all the sheep previously leased to him by Fields, and converted the proceeds to his own use, the plaintiff could not recover, even if he had concealed that fact from Fields, and Fields had, in ignorance thereof, made the alleged settlement and agreement of leasing in May, 1900. The theory of the plaintiff's case is that Fields was the owner of a band of sheep which Penland had been running and caring for along with sheep of his own for a number of years prior to May, 1900; that Fields had not seen the sheep for some time, and did not know the number he owned; that about that time he and Penland had a mutual accounting and settlement as to the number of sheep in Penland's possession belonging to Fields, and Penland agreed to lease them for another year on shares, at the expiration of which time he was to return the sheep to Fields, less a certain per cent for loss, with his share of the increase and wool; that, in violation of such agreement, and before the expiration of the lease, he sold and disposed of the sheep, and appropriated the proceeds to his own use. The action is for the conversion of the sheep alleged to have occurred before the expiration of the lease. It was necessary, therefore, for the plaintiff to prove that Penland had in his possession at the time of the settlement in May sheep belonging to Fields, and that he had converted them to his own use. The settlement and agreement, if made as alleged, would be conclusive as to the number of sheep; but, if Penland had no sheep at the time belonging to Fields, the agreement would not transfer the ownership of other sheep to him, unless they were selected and identified in some way.

It would probably estop Penland and his representatives, in an action for a breach of contract of leasing, or for a failure to return the sheep at the expiration of the time, to deny that he had the number of sheep agreed upon, but this is not an action of that character.

It follows that the judgment must be reversed and a new trial ordered.

REVERSED.

Decided 5 July, 1904.

MASSEY v. SELLER.

[77 Pac. 397, 16 Am. Neg. Rep. 553.]

45	267
f46	574
f47	485

NEGLIGENCE — DUTY OF OWNER OF DANGEROUS PREMISES.

1. An occupant of premises on which there are dangerous places—like an unguarded elevator shaft, for instance—who invites others to enter, owes them the duty of warning as to such places.

NEGLIGENCE — DUTY OF COURT — QUESTION FOR JURY.

2. Where there is no dispute as to the facts and the deduction therefrom is very clear, the court should state to the jury whether the facts show either negligence or contributory negligence.

OPEN ELEVATOR SHAFT — CONTRIBUTORY NEGLIGENCE.

3. Where one who was in a strange building saw a dark place in a corner, and walked into it without determining what was there, and was injured by falling down an open elevator shaft, he was guilty of contributory negligence, precluding recovery.

From Multnomah: MELVIN C. GEORGE, Judge.

This is an action in tort by P. M. Massey against M. Seller and others, arising on account of the alleged negligence of the defendants in maintaining an elevator or hoist in their store building for the purpose of transferring merchandise from one floor to another. It is averred that the elevator was not inclosed in a shaft, and that it had no guards, railing, gate, trapdoors, or other protection, on account of which the plaintiff, without fault on his part, was precipitated down the open space, resulting in his injury. The defendant set up contributory negligence on the part of the plaintiff. A nonsuit having been granted on motion of the defendants, plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Daniel R. Murphy* and *George A. Brodie*, with an oral argument by *Mr. Murphy*.

For respondents there was a brief over the name of *Hogue & Wilbur*, with an oral argument by *Mr. Ralph W. Wilbur*.

MR. JUSTICE WOLVERTON, after making the above statement, delivered the opinion of the court.

The question presented for our consideration arises upon the nonsuit, and, to be understood, requires a statement of the facts developed by the evidence. By agreement of the parties a map of the ground plan of the store building in which the accident occurred was considered in evidence. The building extends from Front Street on the east, along Burnside Street on the north, to First Street on the west. The regular entrances for customers are from the east, but there is also an entrance way from the west. The main business office is situated near the center of the building, with its westerly wall approximately at the center, the entrance thereto being from Burnside Street, and the manager's office set off from this in the southeast corner. West of and adjoining the business office is the shipping room, having an entrance from Burnside Street, through which there appears to be a slight incline from the sidewalk. The room is approximately sixteen by twenty-eight feet, extending lengthwise with Burnside Street. In the southeast corner is the shipping clerk's office, approximately six by eight feet, possibly six by nine, situated lengthwise with the room. Next to this on the north is the elevator shaft, of about the same dimensions, the westerly end extending out even with the shipping clerk's office. This shaft appears from the map to be inclosed on the south by the office partition, on the east by the partition between the shipping room and the main

business office, and on the north by a wall running up with the shaft. The latter inclosure is two feet four inches from the outside wall of the building, and extends slightly, from eight inches to a foot, past the easterly jamb of the doorway from Burnside Street. On the west there is no inclosure whatever to the shaft, the entire width being without gate or guard rails to impede entrance therein from the main floor of the shipping room. On the opposite side of the shipping room from the entrance from Burnside Street is a door leading into the main westerly room of the building, which is designated as "Display Room—Tinware Dept." This door is situated four or five feet farther west than the main entrance, so that one crossing from the display room to the outside entrance would pass in a diagonal direction across the shipping room, approaching the elevator shaft, but leaving it clearly to the right from the nearest point of contact.

The plaintiff was an employé of another wholesale house, and is the only witness who testified to the circumstances of the accident, which occurred about 11 o'clock in the morning. He was sent to the house of the defendants to exchange eighteen or twenty cases of fruit jars. He first drove to the front of the building on Front Street and entered by that way, going around the shipping clerk's office to ascertain about the jars, but, being afraid to leave his horse standing, went out the way he came, and drove around on Burnside Street, and hitched the horse to a telegraph pole. From this point his jars were deposited on the outside of the shipping room, whereupon, by request of the clerk of the defendants, he entered the shipping room and assisted in loading jars from that room, which were upon the opposite side of the door from the shaft, upon his wagon. Finding that defendants did not have at the building a particular size of the jars that was wanted, the clerk, while with plaintiff on the outside of

the shipping room upon the sidewalk, said to him that they would have to go over to Fifteenth and some other street, the name of which plaintiff did not catch, to get them, and went immediately back through the shipping room, the plaintiff following, passing into the display room or tinware department toward First Street. When they had continued some little distance therein, the plaintiff, finding that the clerk was getting ahead of him or was going too fast, concluded to turn about and await his return on the outside. He testified, using his own language: "So I turned to go outside of the door, to get outside again. I came pretty near to the door, and looked in there. It was a little dark in there. I didn't find him. I thought maybe I would find a water-closet in there, because I wanted to go to the closet, and I made a step or two, and I went right into the elevator." Later, he continues, relative to the same incident: "But when I got here, I seen this dark place. I had not been there. I thought it was a closet, and I had been working hard, and wanted to go to the closet, * * and I walked right into it." And, as to the condition of the room: "It seemed very dark to me. I could not say—I never noticed inside the building enough to know—but it seemed very dark to me in there; but to say whether there were any windows or not, I could not say. I know it seemed dark to me after coming out of the light." On cross-examination he further testified, relative to the time of turning back: "I was going outside, but I thought that I could get to the closet. Q. On your way back, how long did you stop in the shipping room? Did you stop there at all? A. No; I walked right back and went off. * * Q. Your remembrance of it is that you passed right back here? A. Yes. Q. What made you think the water-closet was in that place? A. It was a dark, desolate looking place. It was a dark corner, * * and I thought from the looks of it

there might be a closet there. Q. Did you pay much attention where you were going? A. I was not looking for a trapdoor to fall in, but I could see nothing. * * It looked dark. It looked just like a dark corner. Q. What attention did you pay to where you were going? A. I just looked back; simply glanced back. * * Q. Did you look carefully to see? A. No, I don't think I looked; but it was dark in there, a dark corner." He further testified that it was a bright, sunshiny morning, that the door entering from the street was a good-sized one, but that he did not pay any particular attention to it, because he was in a big hurry, and that he did not ask any one where to find a closet.

1. This comprehends the gist of the testimony, and the pivotal question in the case is whether the plaintiff has been guilty of such contributory negligence as will prevent his recovery. It may be assumed that it was the duty of the defendants to warn plaintiff of the danger or apprise him of the unguarded elevator shaft when inducing him to enter the shipping room to make the exchange or transfer of the fruit jars, that it was a duty they owed him, and that they were negligent in the nonobservance of it; but was their negligence the proximate cause of the injury, or was it the contributory negligence, if so found to be, of the plaintiff? "Although," says Mr. Justice LORD, in *Walsh v. Oregon Ry. & Nav. Co.* 10 Or. 250, 253, "the evidence may disclose the defendant to have been guilty of negligence, it will not excuse negligence or the want of proper care and precaution on the part of the plaintiff. The law will not permit a recovery where the plaintiff, by his own negligence or carelessness, has contributed to produce the injury from which he has suffered." If allowed to recover in such a case, he might, as observed by Mr. Justice STRONG, in *Heil v. Glanding*, 42 Pa. 493 (82 Am. Dec. 537), "obtain from the other

party compensation for his own misconduct"; and the result will be the same if such negligence or carelessness be made to appear by plaintiff's own proof, offered for the purpose of establishing defendant's culpability: *Tucker v. Northern Term. Co.* 41 Or. 82 (68 Pac. 426, 11 Am. Neg. Rep. 629). Generally speaking, the question of what is ordinary care and what is negligence is one exclusively for the jury. It carries with it the inquiry as to what a prudent man would have done under like circumstances, and it is not for the court to teach the jury the ways of the prudent man; for the latter, in legal contemplation, are better qualified to speak and judge of that than the court: *Richmond & Danville R. Co. v. Howard*, 79 Ga. 44 (3 S. E. 426); *Killian v. Augusta & K. R. Co.* 79 Ga. 234 (4 S. E. 165, 11 Am. St. Rep. 410).

2. There are three conditions which must obviously take the question of negligence, or its counterpart, contributory negligence, to the jury: (1) Where the facts which, if true, would constitute negligence are disputed; (2) where there might be a fair difference of opinion whether the inference of negligence should be drawn from undisputed facts; and (3) where both the facts and inference are legitimate subjects of controversy: *Hathaway v. East Tennessee R. Co.* (C. C.) 29 Fed. 489. When, however, the facts are unchallenged, and are such that reasonable minds could draw no other inference or conclusion from them than that the party whose acts are in the balance was or was not at fault, then it is for the court to say as a matter of law whether such acts constitute negligence, or contributory negligence, as the case may be: *Beach, Contrib. Neg.*, (2 ed.) §§ 446, 447; 1 *Shearman & Red., Negligence*, (5 ed.) § 56; *Walsh v. Oregon Ry. & Nav. Co.* 10 Or. 250.

3. Now, to apply these principles: The acts of the plaintiff are entirely undisputed, at any rate they must be so

taken and considered for the purposes of the nonsuit ; for the motion operates as a demurrer to the evidence, conceding its truth, and we have but the simple question left whether there can be two inferences from the testimony for reasonable deduction. It is plain that, if plaintiff had pursued his first purpose on turning back from following the clerk and gone outside the building, there to await his return, the accident complained of would not have happened, for the elevator was entirely clear of the passageway from the inner door of the shipping room to the outer door. If blinded somewhat, as he says he was, by coming from the bright sunlight into the building, that could not have stood in his way or confused him in the least, as he was going toward the light admitted into the room by the door through which he was intending to pass out, and a direct course would have taken him to the outside safely. But in approaching the outer door he observed "this dark place," as he terms it, and, wanting to find a water-closet, walked right into the shaft, without knowledge of its existence. He says: "It was a dark, desolate looking place. It was a dark corner, and I went back once before to just about such a place and found a water-closet, * * and I thought from the looks of it there might be a closet there. * * I was not looking for a trapdoor to fall in, but I could see nothing." Now, if it was so dark in there that he could "see nothing," it was certainly an act of folly on his part to enter on a cruise of exploration and discovery without stopping to determine whether it was safe to proceed. To bolt headlong into a place little known, and where the senses can not take note of it, is not the act of a prudent man, and there is no chance for any other inference or deduction concerning it. Reasonable minds could not come to any other conclusion touching it, so that there is nothing for

the jury to determine, and the trial court very properly declared the result as a matter of law.

In *Johnson v. Ramberg*, 49 Minn. 341 (51 N. W. 1043), contributory negligence was imputed to plaintiff for not having looked where he was going in the light. Having entered a warehouse in which he had never been before, and meeting the defendant, he turned aside for him to pass, and in doing so stepped off the head of a pair of stairs. It was held that the bare statement of the facts, together with the admission of the plaintiff that he could have seen the stairway if he had looked, and did not look, was proof inhibitory of his recovery. It was there observed, that, "while the plaintiff was permitted to pass through the wareroom into the store, he could not but know from the surroundings that the place was not a passageway merely, but that it was also largely, if not principally, devoted to the private uses of the proprietor connected with his business; and the plaintiff was not justified, either in closing his eyes as he went through, or in neglecting to observe where he went. He was not justified in assuming that the place was so free from obstacles and from the ordinary conveniences for business that he could move anywhere without paying any attention to the surroundings." In *Bedell v. Berkey*, 76 Mich. 435 (43 N. W. 308, 15 Am. St. Rep. 370), the plaintiff attempted to enter a building by a way with which he was not familiar. To illustrate the condition, we quote from his testimony. He says: "I saw a little light shining through here, ahead of me, just a dim light, and I walked up here, saw this light, took it to be an opening between the door, between the two sections, the middle and the north sections. I turned to my right, and, as I supposed, was going through into this department through a door, and I stepped into a hole." The court, in deciding that the case should not have been left to the jury on account of the contributory

negligence of the plaintiff, says, among other things: "It was his business, if he found it [the room] obscure, to wait until his eyes got accustomed to the light before moving round at haphazard, without using any care whatever to know where he was going. No one has any right to endanger himself, or to disturb other people's arrangements, by moving round in the dark — if it is dark — in a strange room, into which he has entered of his own accord and without direction." And in *Hutchins v. Priestly E. W. & S. Co.* 61 Mich. 252 (28 N. W. 85), it was held that it was contributory negligence as a matter of law for a person to attempt to pass heedlessly through an elevator shaft, supposing it to be a doorway. The principle is further illustrated by the case of *Hilsenbeck v. Guhring*, 131 N. Y. 674 (30 N. E. 580).

There is a distinction to be observed, we are aware, between the rights and responsibilities of a person who is a mere licensee, and one who comes upon premises or into a building of another through invitation or inducement of the owner, express or implied. The former takes the premises as he finds them, but the latter is entitled to the observance of due care and considerate precaution on the part of the owner for his safety and protection against accident: *Indiana, B. & W. Ry. Co. v. Barnhart*, 115 Ind. 399 (16 N. E. 121); *Faris v. Hoberg*, 134 Ind. 269 (33 N. E. 1028, 39 Am. St. Rep. 261). But, having fully in mind this reasonable distinction, we are nevertheless of the opinion that the plaintiff was guilty of contributory negligence. He was in the room by express invitation, it is true; but the purpose for which he had been invited in there had been subserved, and he was not about the business that called him in at the time he was injured. We place no stress on this fact, however, and it may be conceded that he was still in the shipping room by invitation. However, by his own statement, and it is all there is in the

case upon the subject, he passed back into the shipping room from the display room with the express purpose of passing through it to the outside. If he had continued in his course, he would have passed out with perfect safety; but, desiring to get to a closet, he precipitately changed his purpose, and, noticing a dark corner, where he could see nothing, as he says, walked right into the elevator shaft without heeding his way, and the result was the injury of which he complains. He could not have been injured if he had paid the slightest attention to where he was going, or if he had not bolted headlong into the dark corner. He made no inquiry touching the object of his quest, and was heedless in proceeding in the dark without observing where he was going.

From this plain state of the facts, about which there can be no cavil, we are firmly impressed that the plaintiff's acts constitute contributory negligence as a matter of law, and he cannot for that reason maintain the action. The judgment of the trial court will therefore be affirmed.

AFFIRMED.

Decided 27 June, rehearing denied 1 August, 1904.

WOOD v. FISK.

[77 Pac. 128, 738.]

JUDGMENT LIEN — DEFECTIVE DOCKETING.

1. Where a judgment did not become a lien on real property because the judgment docket did not show the date when it was entered therein, the filing of a transcript of such docket entry in another county did not create a lien on realty of the judgment debtor in such other county.

FRAUD OF PLAINTIFF AS A DEFENSE IN EJECTMENT.

2. In an ejectment action by a fraudulent grantee of the land against a purchaser under a subsequent judgment, the fraud is a defense, the purchaser having obtained the legal title subject to the record of the fraudulent deed.

EQUITABLE CROSS-BILL — FRAUDULENT DEED — REMEDY AT LAW.

3. While the fact that a certain conveyance of real estate was fraudulent as to the grantor's creditors is available as a defense at law, such defense would not relieve the land from the fraudulent deed as a cloud on the title, and the defendant in the action at law is entitled to file a complaint in equity in the nature of a

cross-bill, as authorized by B. & C. Comp. § 391, to have such conveyance vacated on that ground, the law remedy being incomplete and inefficient in comparison with the equitable one.

AFFIRMANCE FOR FAILURE TO FILE BRIEF—RULES OF COURT.

4. A delay of three days in filing a brief, though unexplained, will not require an affirmance for failure to comply with the rule of court, where the appeal is evidently prosecuted in good faith.

STANDING IN EQUITY OF EXECUTION PURCHASER—FRAUDULENT DEED.

5. An execution having been issued on a judgment from the county in which it was originally docketed, levied on land in another county, and a sale had thereunder, and such sale having been confirmed and a sheriff's deed issued, the holder under such a title has a right in equity to attack a previous transfer by the debtor as being fraudulent.

From Wallowa: ROBERT EAKIN, Judge.

Statement by MR. JUSTICE BEAN.

In September, 1902, the defendant Richard M. Fisk brought an action in the circuit court of Wallowa County against John A. and Clarissa T. Wood, the plaintiffs, to recover possession of certain real property, with damages for withholding the same. The plaintiffs answered, and at the same time filed a complaint in equity in the nature of a cross-bill, setting up facts which they insisted required the interposition of a court of equity and were material to their defense in the action at law. A demurrer to this cross-bill was sustained, and, the plaintiffs declining further to plead, the cross-bill was dismissed, and they appeal. The case was submitted on briefs under the proviso of Rule 16 of the Supreme Court: 35 Or. 587, 600.

REVERSED.

For appellants there was a brief over the names of *Long & Sweek* and *John S. Hodgins*.

For respondents there was a brief over the name of *Daniel Webster Sheahan*.

MR. JUSTICE BEAN delivered the opinion of the court.

The allegations of the cross-bill, in substance, are that in 1896, one S. A. Miles recovered a judgment against the defendant M. Fisk in the circuit court for Gilliam County

for the sum of \$1,322.02, besides attorney's fees and costs; that the judgment was entered in the judgment lien docket of that county, but the time "when docketed" was not stated therein; that a transcript of the lien docket was filed with the county clerk of Wallowa County on July 2, 1900, and at that time the defendant M. Fisk was the owner of the real property in controversy; that on the 9th of July, 1900, after the entry of the same in the lien docket of Wallowa County, Fisk, without consideration, and for the purpose of hindering, delaying, and defrauding creditors, particularly Miles, the judgment creditor, transferred and conveyed the property in controversy to his son, the defendant Richard M. Fisk; that thereafter an execution was issued on the judgment recovered by Miles against Fisk in Gilliam County, directed to the sheriff of Wallowa County, who by virtue thereof levied upon and sold the real property in controversy to the plaintiff's ancestor, S. G. Wood, for the sum of \$600, he being the highest and best bidder therefor; that the sale was confirmed, and a sheriff's deed issued and delivered to the purchaser, who entered into possession of the premises, and so continued until the 20th of July, 1901, when he died, leaving as his heirs the plaintiffs herein, who have ever since been in possession thereof. The argument in support of the decree of the court below is that it appears from the cross-bill that the plaintiffs had a complete defense to the action of ejectment brought against them by the defendant Richard M. Fisk, and therefore were not entitled to the interposition of a court of equity.

1. The judgment recovered by Miles against Fisk in Gilliam County was never docketed so as to become a lien upon real property, because the time "when docketed" was not stated in the judgment lien docket, as required by statute: *Hutchinson v. Gorham*, 37 Or. 347 (61 Pac. 431); *Western Sav. Co. v. Currey*, 39 Or. 407 (65 Pac. 360, 87 Am.

St. Rep. 660). The filing of a transcript of such lien docket in Wallowa County was therefore ineffectual to create a lien upon the property in controversy, and hence the title acquired by the plaintiffs' ancestor at the sale under the execution issued on the judgment did not relate back to the filing of the transcript, and was not prior in time to the alleged fraudulent deed from the defendant M. Fisk to his codefendant, so that plaintiffs did not have the prior record title. The case, therefore, turns upon the question as to whether the allegation that the conveyance from the defendant M. Fisk to his son, after the rendition of the judgment and prior to the seizure of the property under the execution thereon, was for the purpose of hindering and delaying creditors, constitutes such a defense to the action of ejectment brought by the fraudulent grantee against the successors in interest of the purchaser at the execution sale as will prevent plaintiffs from resorting to equity.

2. Where a debtor has conveyed his property for the purpose of defrauding creditors, it may subsequently be taken on execution against him, because as to the creditors the deed is void and the legal title remains in the grantor. The creditor in such case is not required to resort to equity to have the deed canceled, but may levy upon and sell the property under execution, and the purchaser will obtain a legal title (Wait, *Fraud. Convey.* 3 ed., § 59; 1 Freeman, *Executions*, § 136; *Judson v. Lyford*, 84 Cal. 505, 24 Pac. 286; *Potter v. Adams*, 125 Mo. 118, 28 S. W. 490, 46 Am. St. Rep. 468; *Thompson v. Baker*, 141 U. S. 648, 12 Sup. Ct. 89), and many of the authorities hold he may maintain an action of ejectment thereon against the fraudulent grantee: 14 Am. & Eng. Enc. Law, (2 ed.) 312.

3. It would seem, therefore, that the law action of *Fisk v. Wood* could probably have been defeated by proof that

the conveyance to the plaintiff therein was made and accepted for the purpose of hindering, delaying, and defrauding creditors; but the defense would not have been as complete as in equity. It would have resulted in a defeat of the particular action; but the fraudulent deed would still have remained a matter of record, apparently valid, and a cloud upon the title of the plaintiffs. A purchaser at an execution sale of property fraudulently conveyed may not be required to resort to equity to have the fraudulent conveyance canceled and annulled, yet such is a common and well-recognized head of equity jurisdiction. Equity acts *in personam*, and fraud is one of the grounds of its interposition. The existence of a remedy at law does not interfere with the right of a purchaser at an execution sale to apply to equity to annul or cancel a fraudulent conveyance made by the execution debtor, thereby removing a cloud from his title: Wait, Fraud. Convey. (3 ed.), § 60; *Eaton v. Trowbridge*, 38 Mich. 456. Indeed, equity alone can disentangle the title from the doubt and embarrassments which would otherwise interfere with the full enjoyment of the property and the free disposition thereof. The remedy given a defendant in a law action by Section 391, B. & C. Comp., of filing a complaint in equity in the nature of a cross-bill, when he is entitled to relief arising out of facts requiring the interposition of a court of equity, is as broad as that which he might invoke by an original bill, if it is germane to the matter involved in the action at law and material to his defense, and, unless the remedy at law is "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity," he may file his cross-bill, notwithstanding he may have a defense at law: *South Port. Land Co. v. Munger*, 36 Or. 457, 473 (54 Pac. 815, 60 Pac. 5); *Fire Association v. Allesina*, 45 Or. 154 (77 Pac. 123).

4. The appeal in this case was perfected September 29, 1903. The brief was filed October 28th, but was not served until three days thereafter. The delay in filing and serving the brief was insignificant, and no doubt due to excusable neglect, and is therefore no ground for an affirmance of the decree.

As the court was in error in sustaining the demurrer to the cross-bill, the decree will be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion. **REVERSED.**

Decided 1 August, 1904.

ON MOTION FOR REHEARING.

MR. JUSTICE BEAN delivered the opinion of the court.

5. It is immaterial whether the judgment recovered by Miles against Fisk in the circuit court for Gilliam County was docketed so as to become a lien upon the real property of the defendant in Wallowa County. An execution was issued on the judgment from the county in which it was rendered, the property now in controversy levied upon and sold to plaintiff's predecessor in interest, the sale confirmed, and a deed issued to him. This gives plaintiff a standing in equity to attack a previous conveyance by the judgment debtor, made for the purpose of hindering, delaying, and defrauding creditors, and that is the purpose of the cross-bill. The motion is denied.

REVERSED: REHEARING DENIED.

Argued 12 July, decided 8 August, 1904.

LEMMONS v. HUBER.

[77 Pac. 886.]

WHAT IS A FINAL ORDER—ORDER SETTLING COSTS.

1. An order determining the action on its merits and giving judgment is a final order in the case, and upon its entry the time for appealing begins to run. The taxing of the costs is a subsequent matter the determination of which does not affect the "judgment" in the case: B. & C. Comp., §§ 547 and 2289.

APPEAL FROM JUSTICE'S COURT—RETRIAL ON THE MERITS.

2. On appeal to the circuit court from a judgment of a justice of the peace rendered on an objection to costs, appellant is not entitled to a retrial of the case on its merits.

JUSTICE'S COURTS—APPEAL FROM TAXATION OF COSTS.

3. *Quære.* Will appeal lie from an order of a justice of the peace settling a disputed cost bill? and do Sections 2200 and 2287, B. & C. Comp., make the practice as to taxing disbursements in the circuit courts applicable to justice's courts?

From Marion: GEORGE H. BURNETT, Judge.

Statement by MR. JUSTICE BEAN.

Joseph Lemmons, by his guardian *ad litem*, brought an action in a justice's court to recover the value of three and a half tons of hay alleged to belong to him, which it was averred the defendant wrongfully and unlawfully converted to his own use. The cause came on for trial before a jury March 16, 1903. After plaintiff had introduced his testimony, defendant moved for a nonsuit on the ground that plaintiff had failed to prove title to the hay in controversy. This motion was sustained by the justice, and judgment rendered against the plaintiff for defendant's costs and disbursements, stated in the judgment entry to be \$28.80. On March 18th the defendant filed a cost bill, claiming the amount stated as his disbursements. The next day objections were filed thereto, and a day or so later an amended verified statement was filed by defendant, in which the amount of his disbursements was stated to be \$27.30. On April 17th the matter came on for hearing on the objections to the cost bill, and the justice's court found the amended verified statement to be correct, and

45	282
f45	486
45	282
e47	382

ordered and adjudged "that the amount of disbursements set forth in defendant's amended verified statement of his disbursements, to wit, the sum of \$27.30, be, and the said sum of \$27.30 is hereby, allowed as defendant's disbursements herein." On May 8th a notice was served on the defendant, notifying him that the plaintiff appealed to the circuit court from the "final judgment made and entered in the above-named justice's court on the 17th day of April, 1903, wherein it was 'ordered and adjudged by the court that the amount of disbursements set forth in defendant's amended verified statement of his disbursements, to wit, the sum of \$27.30, be, and the same is hereby, allowed as defendant's disbursements herein.' " At the hearing in the circuit court the plaintiff demanded a retrial on the issues of fact and law as made by the pleadings in the justice's court. The circuit court ruled that the appeal was from the taxation of costs merely, and refused a retrial. The plaintiff declined further to insist upon or prosecute his objections to the cost bill, and it was thereupon ordered and adjudged "by the court that the judgment of the justice's court as hereinbefore described [the one rendered on April 17th] be, and the same is hereby, affirmed; that the defendant have and recover of and from the plaintiff and J. A. Baker, his surety on appeal, the sum of \$27.30 taxed and allowed by said justice's court as defendant's costs and disbursements, and the further sum of \$7.50 as the costs and disbursements of this action in this court." From this judgment the plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. B. F. Bonham* and *Mr. Carey F. Martin*.

For respondent there was a brief and an oral argument by *Mr. Samuel T. Richardson* and *Mr. W. Ellis Richardson*.

MR. JUSTICE BEAN after stating the facts in the foregoing terms delivered the opinion of the court.

1. Plaintiff's motion for a retrial of the issues as made by the pleadings in the justice's court was properly denied. A final judgment, so far as the merits of the case were concerned, was made and entered March 16th. The appeal was not taken until the 8th of the following May—more than thirty days thereafter, and not within the time provided by statute: B. & C. Comp. § 2239. A judgment is final for the purpose of an appeal when it determines the rights of the parties: *State v. Security Sav. Co.* 28 Or. 410 (43 Pac. 162). The justice's court by the judgment of March 16th finally determined the rights of the parties before it, so far as the merits of the case were concerned. It then decided that the plaintiff had failed to sustain the issues of his complaint by his testimony, dismissed the action, and entered judgment against the plaintiff for costs and disbursements; and this was a final judgment. The controversy over the disbursements did not delay the entry of the judgment, nor did the final decision of that question amount to a modification of the judgment, or extend the time in which to appeal: *Wilson v. Palmer*, 75 N. Y. 250; *Hewitt v. City Mills*, 136 N. Y. 211 (32 N. E. 768). The costs were but a mere incident to the judgment. The proceedings subsequent to its rendition were merely for the purpose of ascertaining the amount of the disbursements to which the defendant was entitled, and they did not alter, modify, or affect the judgment in any way. The fact that the justice seems prematurely to have entered in the judgment the amount of the disbursements, as shown by the cost bill first filed before the objections thereto had been disposed of, cannot in any way affect the question.

2. The appeal, although not probably so intended, merely operated to bring up for review the judgment of

the justice's court taxing costs, and on such an appeal the original judgment cannot be attacked or reviewed: *Purvis v. Kroner*, 18 Or. 414 (23 Pac. 260). It is true there is in the record no formal motion to retax costs in the justice's court, but the docket entry shows that the question was disposed of by that court sitting in a judicial capacity, both parties to the litigation appearing, and it is from the judgment rendered on such hearing that the appeal was taken.

3. It has been suggested that an appeal would not lie from the taxation of disbursements in a justice's court, and therefore the circuit court was in error in affirming the judgment of that court in relation to the taxation of costs. The Justice's Code contains no special provisions for the taxation of disbursements, but Sections 2200, 2237, B. & C. Comp., would seem to make the general statute in relation to the taxation of disbursements in courts of record applicable to justice's courts. This question was not discussed in the briefs, and was not particularly urged at the argument, nor is it very material in this case, as the plaintiff was not seeking by the appeal to review the judgment of the justice's court in the matter of the taxation of costs, and makes no question about its correctness. Judgment affirmed. AFFIRMED.

Argued 13 July, decided 8 August, 1904.

THE AURELIA.

BARSTOW v. THE AURELIA.

[77. Pac. 835.]

ACCRUAL OF CAUSE OF ACTION.

1. A cause of action accrues when the owner thereof becomes entitled to sue on it, and not before.

BOAT LIEN — RIGHT TO SUE — LIMITATIONS.

2. Under Section 5722, B. & C. Comp., declaring that actions to enforce liens on boats constructed in this State shall be commenced within a stated time after "the cause of action shall have accrued," the right to sue is complete when the material or labor is to be paid for, and not when it is furnished.

From Multnomah: ARTHUR L. FRAZER, Judge.

Action by Carl H. Barstow against the steamboat Aurelia, her tackle, apparel, and furniture, to enforce a lien under Section 7506, *et seq.*, of B. & C. Comp., resulting in a judgment for the owners of the boat. REVERSED.

For appellant there was a brief and an oral argument by *Mr. Raphael Citron* to this effect.

I. A cause of action accrues when a party has a legal right to sue on it, and not before: 19 Am. & Eng. Enc. Law (2 ed.), 193; 33 Century Dig. p. 393; Angell, Limitations (6 ed.), § 42; *Bartel v. Mathias*, 19 Or. 482, 489 (24 Pac. 918); *Van Nest v. Lott*, 16 Abb. Prac. 130; *Jones v. Barlow*, 62 N. Y. 205; *Re Lewis Sperry*, 47 Conn. 87; *Kennedy v. Burrier*, 36 Mo. 129; *Wolverton v. Taylor*, 132 Ill. 197 (22 Am. St. Rep. 521); *City v. Hamilton*, 132 Ind. 495.

II. Where payment is to be made on the happening of an event or contingency suit cannot be brought until the happening of the event on which payment depends: 19 Am. & Eng. Enc. Law (2 ed.), 193; *Crandell v. Payne*, 54 Ill. App. 644; *People v. Arguello*, 37 Cal. 524 (99 Am. Dec. 290); *Jones v. Barlow*, 62 N. Y. 205.

III. Where a mechanics' lien statute provides that the limitation shall be computed from the time when the cause of action accrued, the time does not begin to run until the debt is due: Phillips, Mech. Liens (2 ed.), § 329; *Robinson v. Marney*, 5 Blackf. (Ind.) 330; *Knickerbocker Ice Co. v. Kirkpatrick*, 51 Ill. App. 61; *Ehlers v. Elder*, 51 Miss. 495; *Cutcliff v. McAnally*, 88 Ala. 509; *Garrison v. Hawkins*, 111 Ala. 308; *Huck v. Gaylord*, 50 Tex. 579; *Kinney v. Hudnut*, 3 Ill. 472; *Cook v. Heald*, 21 Ill. 430; *Meeker v. Sims*, 84 Ill. 422.

IV. If credit is given for supplies and material furnished a vessel, the lien of the person so furnishing for the price thereof continues on the vessel for one year

after the demand falls due, without reference to whether the extension of credit was with or without the consent of the boatowner: B. & C. Comp. §§ 5706 and 5722; *Edgerly v. Schooner San Lorenzo*, 29 Cal. 419; *The John Walls Jr.*, 1 Sprague, 178 (Fed. Cas. No. 7432); *Tyler v. Currier*, 76 Mass. (10 Gray) 54.

For respondent there was an oral argument by *Mr. Elmer E. Coover*, with a brief over the name of *Coover & Stapleton*, to this effect.

1. The extension of time was between the materialman and the contractor, and the rule as to the effect of an extension will be more strictly construed when the owner is not a party to the agreement. Suit must be brought within one year after the cause of action accrued by operation of law, upon the furnishing of materials, without any agreement as to an extension of credit. If a materialman contravenes this rule by contracting to extend the time of credit he waives his lien altogether, if extended beyond the year, or such part as is covered by the extension, if within it. It is not competent for the parties to enlarge the lien given by statute: *Darby v. Steamboat Inda*, 9 Mo. *653; *Emerson v. Steamboat Shawano City*, 10 Wis. *433; *Newcomb v. Clermont*, 3 Greene, 295.

2. A lien is waived by giving credit when the credit is inconsistent with the lien: 19 Am. & Eng. Enc. Law (2 ed.) 1135; 20 Am. & Eng. Enc. Law (2 ed.), 362, 369; *The Kearsarge*, 1 Ware, 546 (Fed. Cas. No. 7634); *Veltman v. Thompson*, 3 N. Y. 442; *Mott v. Lansing*, 57 N. Y. 116; *Scudder v. Balkan*, 40 Me. 292; *Mehan v. Thompson*, 71 Me. 500.

MR. JUSTICE BEAN delivered the opinion of the court.

This is an action to enforce a lien under the boat lien law of this State on the steamboat *Aurelia* for materials used in her construction. The boat was built by one Ross, as contractor, and was completed on March 1, 1903. From

time to time between September 11 and October 17, 1902, during the building of the boat, Ross purchased of the plaintiff's assignor sundry materials to be used, and which were used, in the construction of the boat, under an agreement that the value thereof should not become due and payable until the boat had been completed. Section 5706, B. & C. Comp., provides: "Every boat or vessel used in navigating the waters of this State or constructed in this State shall be liable and subject to a lien, * * (2) for all debts due to persons by virtue of a contract, express or implied, with the owners of a boat or vessel, or with the agents, contractors, or subcontractors of such owner, or any of them, or with any person having them employed to construct, repair, or launch such boat or vessel, on account of labor done or materials furnished by mechanics, tradesmen, or others in the building, repairing, fitting, and furnishing, or equipping such boat or vessel, or on account of stores and supplies furnished for the use thereof, or on account of launch ways constructed for the launching of such boat or vessel." Sections 5707 to 5721, inclusive, provide the method of procedure for enforcing such lien, and Section 5722 declares: "All actions against a boat or vessel under the provisions of this chapter shall be commenced within one year after the cause of action shall have accrued." This action was commenced November 23, 1903, within one year after the credit allowed the contractor had expired and the debt had become due and payable, but not within a year after the materials were furnished.

1. The single question for decision is whether it was brought within the time required by law. The language of the statute seems to be so plain upon this point as to leave but little room for argument. It limits the time for the commencement of an action to enforce a lien to one year after "the cause of action shall have accrued."

Now, it is common learning that a cause of action does not accrue until the party owning it has a legal right to sue on it. In short, it accrues at the moment he may bring and prosecute an action thereon, and not earlier: 19 Am. & Eng. Enc. Law (2 ed.), 193.

2. In interpreting the boat lien law, there is no reason apparent why the language of the statute should be given any other than its ordinary and generally understood meaning. If the legislature had intended that the time in which to commence an action to enforce a lien should begin to run from the date of furnishing the material, regardless of the credit extended, it would have so provided. It did not do so, but, on the contrary, declared that the claimant should have one year from the time the cause of action accrued in which to commence his action, and this plainly means one year from the time he is entitled to sue on his claim. The reasoning of Mr. Justice SAWYER in *Edgerly v. Schooner San Lorenzo*, 29 Cal. 419, construing a similar statute, is clear and convincing, and gives effect to the plain import of the language used by the legislature. It can make no difference whether the materials were purchased by the owner or contractor, because the statute makes no distinction on that account. The earlier cases in Wisconsin and Missouri (*Emerson v. Steamboat Shawano City*, 10 Wis. *433; *Darby v. Steamboat Inda*, 9 Mo. *653), holding that under statutes of similar import the time in which to commence the action dates from the time the materials were actually furnished, and not from the expiration of the credit given therefor, are seemingly based upon the idea that possible hardship and injustice might be inflicted if the language of the statute were given its ordinary meaning. That is a matter, however, with which the courts have nothing to do. If a statute is plain and unambiguous, it is the province of a court to enforce it as

it comes from the legislature, and, if the language used does not express the idea intended to be conveyed, or if the law produces inconvenience or hardship, the remedy is with the legislature, and not with the court. The judgment of the court below will be reversed, and it is so ordered.

REVERSED.

Decided 17 October, 1904.

McPHEE v. KELSEY. *

[78 Pac. 224.]

VACATING APPELLATE DECREE — AMBIGUOUS PLEADINGS.

When the pleadings are ambiguous, and do not clearly define the rights insisted upon, and one of the parties has been misled to his prejudice by failing to offer testimony, a decree will be vacated to give an opportunity for the introduction of further testimony.

Appeal from Baker County.

This is a motion to vacate a decree of this court.

For the motion there was a brief and an oral argument by *Mr. Thomas H. Crawford*.

Contra, there was a brief over the names of *Leroy Lomax* and *John L. Rand*, with an oral argument by *Mr. Lomax*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

A petition for a rehearing having been overruled, defendant's counsel filed another application, which has been treated by this court as a motion to vacate the decree herein and to remand the cause to take further testimony as to whether all the water of Hutchinson Slough was intended by the parties to be included in their agreement of 1888, and whether a new appropriation of the water of North Powder River was made by either party from the enlarged ditch for the irrigation of more than

* This decision was rendered after the previous opinions in the case had been printed (44 Or. 193), otherwise it would have been published with them.

the first crop of alfalfa. Briefs having been filed and arguments made on these questions by counsel for the respective parties, we think the defendant may have been misled by the averments of the complaint, which are rather ambiguous respecting the questions now sought to be raised, and the cause tried on an erroneous theory in relation thereto, whereby relevant evidence was omitted. Judgments and decrees based on issues sharply defined ought not to be set aside for light or trivial reasons, notwithstanding a failure to introduce testimony; but when the pleadings do not so define the rights insisted upon, and one of the parties has been misled thereby to his prejudice, by failing to offer testimony, an innate sense of justice ought to prompt a court to correct what might otherwise prove a travesty on justice, and, believing that an error may have been committed in the respect indicated, the decree rendered in this court will be vacated, and the cause sent back for the introduction of such testimony as the parties may offer under the issues heretofore construed by this court, and for such further proceedings as may be necessary.

DECREE VACATED.

Decided 15 August, 1904.

WOLDENBERG v. BERG.

[77 Pac. 873.]

PARTNERSHIP — DISSOLUTION — PROFITS.

Where plaintiff and defendant entered into a partnership agreement — plaintiff to contribute the entire plant, and defendant, out of his share of the surplus earnings, to repay to him one half the expenditure therefor — the increase in the value of the plant is to be considered part of the profits, on a dissolution before the stipulated time, owing to their disagreement, as to which they were equally at fault.

From Harney: MORTON D. CLIFFORD, Judge.

Suit by Louis Woldenberg against Christian Berg for the dissolution of a partnership and an accounting.

Plaintiff appeals. The case was submitted on briefs under the proviso of Rule 16 of the Supreme Court: 35 Or. 587, 600. MODIFIED.

For appellant there was a brief over the names of *Thornton Williams* and *Biggs & Biggs*.

For respondent there was a brief over the name of *Parrish & Rembold*.

MR. JUSTICE WOLVERTON delivered the opinion.

This is a suit for the dissolution of a partnership and an accounting. The parties entered into partnership relations by articles of agreement which provide that the business, consisting of the manufacture and sale of lager beer, steam beer, ale, and porter, in the Town of Burns, Harney County, Oregon, and to be conducted under the firm name of Woldenberg & Berg, shall commence March 26, 1898, and continue during the term of ten years; that the interest of the parties shall be equal, and that the profits and losses shall be shared accordingly between them; that Woldenberg shall contribute to the business the entire plant, with machinery fully equipped for brewing purposes; and that Berg shall repay him one half of the actual expenditure therefor out of his share of the surplus earnings, after deducting among other expenses, \$30 per month each for plaintiff and defendant for personal use, Woldenberg to receive no interest on the excess of his investment above Berg. The business was entered upon in pursuance of the agreement, and was carried on with more or less success until September, 1901, when the parties disagreed, resulting in a discontinuance of the business, and on October 24th following this suit was instituted to wind up the affairs of the firm. Much testimony was taken, covering a very wide scope in the negotiations leading up to the forming of the partnership, the manner of conducting the business, keeping the books, and their final

disagreement, but the only matter that is particularly relevant is that which bears upon the disagreement and the accounting. It is clearly proven that the parties, owing to their differences of opinion as to the proper method of further promoting the business, could not longer operate in harmony, and hence it was necessary that the partnership affairs should be closed out. In this one party was not more at fault than the other, their mutual disapproval each of the other's methods culminating in the necessity for a dissolution of their relations. Each of the parties has rendered a statement showing the condition of the business, but differing widely. The trial court adopted in the main the statement of the defendant, and we are impressed that it is the more nearly correct. It is impossible, owing to the negligent and irregular manner in which the books were kept, to reach a thoroughly satisfactory result. Defendant's statement is more in detail, reference being made to much data whereby it may be verified, yet our judgment is that it is inaccurate as to the item of money drawn by Woldenberg. As to this there is no reference to any account kept by either of the parties, and we prefer plaintiff's statement concerning it. We are unable to concur, however, with the trial court's conclusions of fact and law; and, that the result may be clearly understood, we make the following brief summary of our conclusions, from which the proper statement of facts may be deduced, and the decree formulated. As no good purpose can be subserved by a discussion of the testimony, we will not attempt it, but rest the case with as clear a statement of the account as we can make. Parenthetically, it should be observed that the parties also engaged in conducting a saloon in the Town of Burns during a portion of the time that they were in the brewery business, but the whole was considered and treated by them as one business, and the accounting has been conducted upon

that basis. No further special reference, therefore, need be made to the saloon business. And further, as preliminary to the general accounting, it should be stated that the entire period in which the parties were engaged as partners, to the date of the institution of this suit, is three years six months and twenty-eight days.

Under the agreement, each of the parties was entitled to an allowance of \$30 per month for his personal use, which is properly an expenditure of the business. The total amount payable to each, therefore, was \$1,288. Berg has drawn \$1,798.30—a sum in excess of that to which he was entitled by \$510.30. Woldenberg, on the other hand, has drawn but \$1,178, leaving due him on his personal account, \$110. Now, to the general statement:

The cost of the plant by invoice, substantially agreed to by the parties, is.....	\$ 8,888 53
But as the value of the plant is, as practically conceded by plaintiff, \$10,000, the cost value ceases to serve as a factor in determining the relative interest of the parties in the assets of the concern; the increase in value becoming a part of the profits of the investment.	
The cash receipts from all sources are.....	\$21,358 60
Accounts due the firm.....	495 68
Value of the plant.....	10,000 00
Total receipts and assets.....	\$31,854 28
Upon the other hand, the total amount of moneys paid out is.....	\$26,608 46
Accounts owing by the firm.....	739 34
Amount due Woldenberg on personal allowance.....	110 00
Total money paid out and liabilities.....	\$27,457 80
From this should be deducted amount drawn by Berg above his personal allowance.....	510 30
Balance actual expenditures and liabilities.....	\$26,947 50
Deduct this amount from receipts and assets.....	\$31,854 28
	26,947 50
And we have.....	\$ 4,906 78
as the profits realized, one half of which, or.....	2,453 39
represents the earnings of each partner.	

However, as the defendant has drawn \$510.30 above his personal allowance under the articles of partnership, his interest remaining would be diminished by that sum, or-----

1,943 09

The assets of the enterprise are:

Accounts due the firm----- 495 68

Value of the plant----- 10,000 00

Total ----- \$10,495 68

This total, less the defendant's interest----- 1,943 09

would represent the plaintiff's interest, viz.----- \$ 8,552 59

This gives us the proportional basis for final adjustment between the parties. It is necessary that the assets be sold, which will be the decree of the court, and the proceeds arising therefrom will be applied (1) to the payment of the costs and disbursements of this suit, including those arising in the trial court as well as this, and accruing costs incident to the closing up of the business; (2) to the payment of the liabilities of the firm, including \$110 to plaintiff, and the remainder will be divided between the parties in the proportion of ~~xxxx~~ thereof to the defendant, and ~~xxxx~~ to the plaintiff.

The trial court allowed the defendant \$30 per month during the entire time of the continuance of the litigation. This we deem to be error. If he was entitled to that sum, plaintiff was entitled to a like sum. When, however, they ceased to engage in business under their articles of partnership, neither was entitled to the stipulated amount for personal use, and the accounting should not include the item. Neither should there be any decree against the plaintiff's surety on the injunction bond for costs or other amount. The decree will declare a dissolution of partnership, and direct the appointment of a receiver to wind up the business and distribute the funds. MODIFIED.

Argued 9 June, decided 5 July, 1904.

SHERIDAN v. EMPIRE CITY.

[77 Pac. 393.]

EVIDENCE OF ADVERSE POSSESSION.

1. The evidence adduced shows that part of the land in dispute has been adversely used by the defendant for more than ten years, whereby plaintiff's title has been extinguished.

RATIFICATION OF PLAT BY PAYING TAXES.

2. The mere voluntary payment of taxes and street assessments levied on certain land is not evidence of a ratification of the plat of such land with reference to which the levies and assessments were made.

RATIFICATION.

3. A party not under obligation to act with reference to a certain claim cannot be bound to such claim, or be held to have ratified it, by mere silence; for instance, a lot owner cannot be said to have ratified the action of the municipality in establishing certain boundaries, by merely keeping silent until his lots were intruded upon, no matter how long the silence.

From Coos: JAMES W. HAMILTON, Judge.

Suit by Florence Sheridan and others against Empire City to quiet the title to certain real property, resulting in a decree for plaintiffs, from which defendant appeals.

MODIFIED.

For appellant there was a brief over the name of *Hall & Hall*, with an oral argument by *Mr. John F. Hall*.

For respondents there was a brief over the names of *Joseph W. Bennett* and *C. F. McKnight*, with an oral argument by *Mr. Bennett*.

MR. JUSTICE WOLVERTON delivered the opinion.

1. The plaintiffs claim to be the owners in fee of that portion of First Street in the Town of Empire City, Coos County, Oregon, as denoted on the plat thereof filed by W. H. Harris and A. N. Foley, November 19, 1858, beginning with the southern boundary of F Street, and extending southwesterly ninety feet, and also of about fourteen feet in width of F Street, beginning at the meander line where it crosses said street, and extending westerly along the northerly boundary of block 6, and beyond to deep water

on Coos Bay. The defendant claims the property as public streets thereof, which it is alleged have been used and occupied exclusively and adversely as such for more than forty years, and, as a further defense, it is alleged that in August, 1888, the defendant, with the knowledge and consent of plaintiff's predecessors, adopted a plat of the Town of Empire City, showing said tracts to be within the boundaries of First and F streets, and that the same was acquiesced in, adopted, and ratified by P. Flanagan, the immediate predecessor of plaintiffs. The meander line of ordinary high water, as indicated by the government survey, passes through the northeasterly corner of block 5, thence in a southerly direction across First and F streets, entering block 13 a little to the south of the northwesterly corner, and extends through lots 8, 1, and 2 thereof. Block 6 lies westerly from block 13, and wholly to the west of the meander line. On May 12, 1873, one H. P. Whitney obtained a deed from the Board of Commissioners for the Sale of School Lands for the State of Oregon to tide land fronting and abutting on lot 8, in block 13, comprising the property in dispute. The plaintiffs deraign title from Whitney, but none of the conveyances in their chain are made with reference to the town plat. On June 11, 1873, Whitney deeded lot 8, block 13, to James S. Kiley, who, with his successors in interest, has occupied it ever since. Prior to Whitney's purchase from the State, one Amos Rogers erected a building, partially if not wholly within the boundary of First Street, fronting on F Street and extending back some sixty feet. Kiley subsequently erected a building extending along the western boundary of lot 8, fronting also upon F Street. An elevated sidewalk was maintained along F Street in front of the Kiley building, thence to and in front of the Rogers building. Kiley also constructed a walk eight feet in width along the westerly side of his building, and Rogers, or Whitney, who suc-

ceeded him, constructed a walk four or five feet in width along the easterly side of his building, and from the southerly end of the Rogers building a crosswalk was devised by placing some planks from one walk to the other. These buildings and walks were maintained continuously for many years, and until the Rogers building was destroyed by fire in 1899, thus completely obstructing First Street at that point to the use of the public, except as the sidewalks designated afforded opportunity therefor. In later years the sidewalk along the Kiley building on First Street has been continued southerly along the margin of the block to the Odd Fellows' building, situated on lot 1, and was being so maintained at the time of the commencement of this suit.

In 1891 the common council of the Town of Empire City reestablished the base line along Broadway Street, from which to determine the location of streets, lots, and blocks in the town and its additions, and on January 19, 1892, adopted an ordinance for the improvement of First Street, from the southern line of E Street to within seven feet of the southern line of F Street, by constructing an elevated roadway and decking the same with planks, the cost of which improvement was assessed against the abutting property. Among others, a portion was assessed against lots 5 and 6, in block 6, to Patrick Flanagan, the ancestor of plaintiffs, and from whom they derive their title. It will be noted that these lots lie at the southwest corner of the square formed by the intersection of First and F streets, all but seven feet of the southerly portion of which was included in the improvement. This assessment was paid, whether by Patrick Flanagan or not does not appear. Lots 5, 6, 7, and 8, in block 6, have been from time to time assessed by the county to the predecessors of plaintiffs. After obtaining title from the State, H. P. Whitney constructed a driveway from First Street, commencing,

perhaps, within the street along the southerly side of F Street, extending to deep water on the bay, where he erected a wharf. These structures have since been maintained by him and the predecessors in interest of plaintiffs. While the public have used them, they have been maintained in a private capacity and regarded as private property, with the exception of that portion thereof which lies within the square formed by the junction of First and F streets. These facts clearly appear from the testimony, and it remains to deduce the legal status of the parties litigant.

Evidently, when Harris and Foley dedicated the Town of Empire City in 1858, they nor neither of them owned the tideland which is indicated as lying westerly from the meander line designated by the government survey, and could not, therefore, lawfully make dedication of any part thereof to the public. How Whitney came by lot 8, in block 13, does not appear. He probably purchased with reference to the plat, however, and this holding very likely formed the basis for his purchase of tideland from the State, which includes the premises in dispute. But Whitney has not, nor have plaintiffs' other predecessors in interest, conveyed with reference to the plat of Empire City, or in that manner adopted, approved, or ratified it. They continuously maintained the building erected by Rogers in First Street until destroyed, and the crosswalks in connection therewith, so as to exclude the public from the entire street, except upon the walk constructed by Kiley along his building, and since maintained by him and his successors in interest. As to this walk, plaintiffs' predecessors seem never to have exercised any control over it or to have claimed any right with reference to it, and as to it the use has been adverse to plaintiffs. Plaintiffs' predecessors have had and maintained a like use of the driveway along F Street to the bay, exclusive of the public,

except that portion thereof comprised in the crossing of First Street. The improvement of the square was made by the town shortly after February, 1892, more than ten years prior to the commencement of this suit, in which plaintiffs and their predecessors seem to have acquiesced without objection. They have not since claimed any interest in that portion of the street, or exercised private ownership thereof, while, on the contrary, it is manifest that the public have in the mean time used and occupied it adversely. With these two exceptions, plaintiffs are the owners in fee of the whole of tracts 1 and 2 as described in their complaint. But as to the exceptions, their right and title must be held to have been extinguished by adverse user by the town and the public as public streets.

2. It is further insisted by counsel for defendant that plaintiffs and their predecessors have ratified the dedication of the town plat, as made by Harris and Foley, by having paid the taxes levied from time to time on lots 5, 6, 7, and 8, in block 6, of the Town of Empire City, so described upon the assessment roll, and the assessment for street improvements heretofore alluded to; but we do not think that such is the result or legal effect of their acts in that respect. They were not called upon to supervise or revise the acts of the officers of the county or town, if inaccurate or erroneous, and the mere payment, without objection or protest, of taxes and assessments levied and made upon realty, is an act without persuasive force as indicating an adoption or ratification of any particular plat with reference to which the levies and assessments were made.

3. Nor do we think that the act of the common council in reestablishing the base line by ordinance in 1891, from which to determine the correct location of streets, lots, and blocks in the city and its additions, had any tendency to preclude the plaintiffs as it relates to the dedication of said

plat, for it does not appear that they have ever done anything or performed any act with reference to the reestablishment of such base line, or to the lots and blocks as designated by the plat, from which a ratification could be inferred.

Another contention advanced by defendant's counsel is that the tideland did not extend to the meander line indicated by the government survey; but the strong weight of the testimony is against the position.

It follows from these considerations that the decree of the trial court should be modified so as further to except from plaintiffs' ownership in fee that portion of the square formed by the intersection of First and F streets included in tract No. 2 as described in the complaint, and in all other respects it should be affirmed, and such will be the decree of this court.

MODIFIED.

Decided 5 July, rehearing denied 17 October, 1904.

TROTTER v. TOWN OF STAYTON.

[77 Pac. 395.]

45	301
47	178

EJECTMENT — MEASURE OF DAMAGES.

1. Under Section 328, B. & C. Comp., which permits a plaintiff in an ejectment action to recover damages, an aggrieved party is entitled to recover all damages fairly resulting from the wrong complained of, if they are properly pleaded, as, that by reason of being excluded from possession plaintiff was prevented from constructing a building on the land in dispute in which to conduct his business, and was deprived of free access to other land not in dispute.

TRIAL — EXCLUDING WITNESSES FROM THE COURTROOM.

2. An officer of a corporation who is not shown to have any special information rendering his presence important to the protection of its rights is within the meaning of Section 848, B. & C. Comp., authorizing the trial judge, upon the request of either party, to exclude from the courtroom witnesses not under examination.

INTERMEDIATE DECREE AS EVIDENCE.

3. The rights of parties are to be determined by the final order of the last court to which a case has been taken, and not by the adjudication of an inferior court from which the case has been appealed.

ALLEGATIONS AND PROOFS — NEED OF SUPPLEMENTAL PLEADING.

4. Events happening after the issues are joined are not competent evidence unless under supplemental pleadings: for instance, in an action of ejectment

against a city, it was not error to exclude proceedings of the common council of the defendant, instituted for the purpose of condemning the land for public use, where such proceedings were not consummated, and the final ordinance attempting to appropriate the property in question was not passed, until after the issues in the case at bar had been joined, and no supplemental answer was filed.

From Marion : GEORGE H. BURNETT, Judge.

This is an action by G. D. Trotter against the Town of Stayton to recover possession of a strip of land twelve inches wide off the north end, and a strip six and one half inches wide off the east side, of the north half of lots 5 and 6, in block 5, in the Town of Stayton, and damages for withholding the same. In 1900 the defendant corporation caused the street lines of the town to be surveyed by Mr. Gobalet; the survey showing the property in controversy to be in the streets. In making the survey, however, Gobalet did not follow the original field notes, or attempt to locate the streets as actually established, but endeavored to straighten them, so that those in the town as first laid out and those in the subsequent additions would conform as nearly as possible. A short time after the Gobalet survey was made, the plaintiff, at the request of the town authorities, built a sidewalk in front of his property, conforming to the lines of the street as run by Gobalet. He subsequently had the county surveyor run the true lines, and moved his sidewalk out to them, inclosing his property with a fence. He then brought a suit in equity against the town to quiet his title, which was decided by the circuit court in favor of the town; but upon an appeal to this court the decree was reversed, and one entered here in favor of the plaintiff, establishing his title to the property now in controversy: *Trotter v. Stayton*, 41 Or. 117 (68 Pac. 3). A short time after the decree of the circuit court, and after the appeal had been taken, the town took possession of the disputed property, notified the plaintiff to remove his fence and sidewalk, and arrested and fined him for not doing so. After the decree of this

court it refused to surrender possession, whereupon this action was commenced.

- . The complaint contains the allegations usual in actions of this character, and in addition avers, in paragraph four thereof, in substance, that the plaintiff was at the time of the commencement of the action, and for many years prior thereto had been, engaged in a general merchandising business, occupying a rented storeroom adjacent to the property in controversy, and doing a large and prosperous business; that prior to the commencement of the action he had been notified by the owner to quit and deliver up possession of the building occupied by him, and was therefore compelled to look elsewhere for a suitable store building; that he was unable to rent such a building in the town, and had intended to construct, and had actually begun the construction of, a building on his property, but was prevented from completing the same by the defendant wrongfully and unlawfully taking possession thereof; that the whole of his premises was necessary for his building, but the defendant had purposely and wilfully, and with the intent to prevent him from occupying or using the same and to injure him in his business, taken possession of the strip of land in controversy and withheld it from him, and thereby prevented him from having free access to or use or occupancy of his premises; that before the commencement of the action, and for the express purpose of intimidating and preventing him from exercising and enjoying the free use and occupation of his premises, it caused him to be arrested for an alleged offense of obstructing a public street; that by reason of the facts alleged the plaintiff has been deprived of the use of his premises, injured in his business, and has thereby sustained special damages in a stated sum. A motion to strike out paragraph four of the complaint, because it was sham, frivolous, and irrelevant, and the damages

claimed were too remote to be recovered in this action, was overruled, and the defendant answered. In its answer it denied the material allegations of the complaint, except its possession of the property in controversy, setting up affirmatively: (1) An appropriation of the property by virtue of the Gobalet survey; (2) that the equity suit brought by the plaintiff against the defendant to quiet his title was still pending and a bar to the maintenance of the present action; (3) the proceedings of the common council of the defendant, initiated after the decree in equity, for the purpose of condemning and appropriating the property in controversy to the town as a public street; and (4) an estoppel or acquiescence by the plaintiff in the lines as surveyed and established by Gobalet. The reply put in issue the material allegations of the answer, and the trial resulted in a verdict and judgment in favor of the plaintiff, and defendant appeals. AFFIRMED.

For appellant there was a brief over the names of *Tilmon Ford*, *William H. Holmes*, and *Webster Holmes*, with an oral argument by *Mr. Ford* and *Mr. W. H. Holmes*.

For respondent there was a brief over the names of *Carson & Adams* and *Geo. G. Bingham*, with an oral argument by *Mr. John A. Carson* and *Mr. Bingham*.

MR. JUSTICE BEAN, after stating the facts in the foregoing terms, delivered the opinion of the court.

1. The motion to strike out paragraph four of the complaint was properly overruled. The right to recover damages for withholding the possession of real property, given by Section 326, B. & C. Comp.,* is equivalent to the common-law action for trespass for mesne profits, and "includes all damages to which the owner is entitled on account of the wrongful occupation of the property":

*This section is as follows: "Any person who has * * may recover such possession, with damages for withholding the same, by an action at law."

Wythe v. Myers, 3 Sawy. 595 (Fed. Cas. No. 18119). Ordinarily, the measure of damages is the fair value of the use of the premises during the occupancy of the defendant; but the plaintiff is not confined alone to such damages. He is entitled to recover all damages which he may suffer, fairly resulting from the wrong complained of, if specially pleaded: 10 Am. & Eng. Enc. Law (2 ed.), 547; Newell, Ejectment, pp. 607, 627; 3 Sedgwick, Damages, § 907; 3 Sutherland, Damages, §§ 993, 994; *Herreshoff v. Tripp*, 15 R. I. 92 (23 Atl. 104); *Dunn v. Large*, 26 Eng. Common Law, 223. At common law nominal damages only were recoverable in an action of ejectment, and a plaintiff, if he recovered more, was obliged to bring an independent action in trespass to recover mesne profits. The statute combines these two actions; but there is no reason why a plaintiff may not plead and give in evidence in an action to recover real property under the statute any damages he may have suffered, fairly resulting from his having been wrongfully kept out of the possession. In this, as in all cases, compensation is the measure of damages, and if a plaintiff has been unnecessarily annoyed or harassed and his business injured by the wrongful acts of a defendant in taking and retaining possession of real property, there is no reason why, in an action to recover possession thereof, he may not plead and recover such special damages. The matters set up in the fourth paragraph of the complaint, if true, entitled the plaintiff to damages in excess of the mere rental value of the property, and were, we think, proper to be pleaded in an action of this character. This conclusion disposes of the objections made by the defendant to the evidence offered and admitted tending to sustain the allegations of the complaint.

2. On motion of the plaintiff the court excluded all

witnesses of the defendant from the courtroom, except the one under examination. The defendant's counsel requested that the recorder of the defendant municipality be exempt from the order and permitted to remain within the bar of the court for the purpose of advising with counsel during the trial. This request was denied, and the ruling is assigned as error. The statute provides that, if either party requests it, the judge may exclude from the courtroom any witness of the adverse party not at the time under examination: B. & C. Comp. § 843. This statute does not authorize the exclusion of a party (*Schneider v. Haas*, 14 Or. 174, 12 Pac. 236, 58 Am. Rep. 296); but an officer of a corporation litigant is not within that sense a party, and especially where, as in this case, no showing was made that he possessed any special information or knowledge concerning the case on trial which would render it necessary that he should remain in the courtroom to protect the interests of the defendant. Whether an officer of a corporation might not occupy such a relation toward it and the subject-matter of the litigation as to be within the spirit of the rule announced in *Schneider v. Haas*, 14 Or. 174 (12 Pac. 236, 58 Am. Rep. 296), we do not undertake to decide.

3. The defendant offered in evidence the decree of the circuit court, rendered in the suit in equity brought by the plaintiff against the defendant to quiet his title; but the court refused to admit it, and in this there was no error. The decree had been reversed, and a final decree rendered in this court establishing the plaintiff's title, and the rights of the parties must be ascertained from the decree on appeal, and not from that of the court below: *Gentry v. Pacific Livestock Co.* 45 Or. 233 (77 Pac. 115).

4. The remaining question discussed in the brief is based on the alleged error of the trial court in refusing

to admit in testimony certain proceedings of the common council of the defendant corporation, had after the final decree in the equity suit, for the purpose of condemning and appropriating for public use the property now in controversy. This matter is not assigned as error in the abstract, and under Rule 10 of this court (35 Or. 587, 598) and the decision interpreting it (*Re Assignment of Bank of Oregon*, 32 Or. 84 51 Pac. 87), we are probably precluded from considering it. Passing over this point, however, the record was properly excluded because the proceedings were not consummated, and the final ordinance, attempting to appropriate the property in question, was not passed by the council, until after the issues in this case had been made up, and it is not pleaded as a defense. The amended answer was filed on the 14th of October, 1902, and the reply filed on the 18th of the same month. Ordinance No. 67, "to straighten certain streets within the Town of Stayton," was passed by the council about a month later, and no supplemental answer was filed setting up such proceedings as a defense.

It follows that the judgment must be affirmed, and it is so ordered.

AFFIRMED.

Argued 9 June, decided 5 July, 1904.

BAINES v. COOS BAY NAVIGATION CO.

[77 Pac. 400.]

CORPORATIONS — PRESUMPTIVE KNOWLEDGE OF OFFICERS AS TO POWER OF CORPORATE AGENTS.

1. Corporate officers are chargeable with knowledge of the extent of the authority of agents and other officers of their corporations, and as to them the doctrine of Implied authority is not applicable.

CORPORATIONS — IMPLIED POWER OF GENERAL MANAGERS.

2. Excepting in banks, managing agents of corporations have no implied power to issue, accept, or indorse negotiable paper on behalf of their principals, unless there are pressing legitimate demands and the manager is without funds.

CORPORATIONS — POWER OF MANAGER TO ISSUE NOTES.

3. The general manager of a corporation having entire control of its affairs,

has implied power to issue negotiable paper in the name of the corporation for its benefit, particularly where he owns all the stock and is practically the company.

QUESTION FOR JURY—POWER OF CORPORATION MANAGER.

4. In an action on the notes of a corporation executed by the general manager to secure the release of pressing demands against the company, the question whether the manager had implied power to execute the notes should be submitted to the jury.

DISCRETION OF COURT AS TO AMENDMENTS OF PLEADINGS.

5. Granting permission to amend pleadings is a matter of discretion with the trial judge, which was well exercised in this instance.

From Coos: JAMES W. HAMILTON, Judge.

Action by W. E. Baines against the Coos Bay, Roseburg & Eastern Railroad and Navigation Company, on sundry promissory notes. The court directed a verdict for defendant, from which plaintiff appeals. REVERSED.

For appellant there was a brief over the names of *Jos. W. Bennett*, *T. S. Minot*, and *Andrew J. Sherwood*, with an oral argument by *Mr. Bennett* and *Mr. Minot*.

For respondent there was a brief over the names of *John S. Coke, Jr.*, and *Williams, Wood & Linthicum*, with an oral argument by *Mr. J. Couch Flanders*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is a second appeal by the plaintiff from a judgment rendered against him for costs and disbursements upon a verdict returned in pursuance of instructions. The question involved is whether the testimony taken at the trial was sufficient to be submitted to the jury as tending to show that the general manager of a railroad company possessed implied power to execute on its behalf promissory notes evidencing debts claimed to have been incurred by it in the legitimate exercise of its business; and the chief error relied upon is the action of the court in charging the jury to find for the defendant.

The bill of exceptions contains all the evidence, from which it appears that the defendant is a corporation existing under the laws of this State, and organized to con-

struct, maintain, and operate a railroad from Marshfield to Roseburg; that one R. A. Graham was its promoter and the subscriber for all its capital stock, though each director was the nominal holder of enough thereof to qualify him for office. At the first meeting of the board of directors, held August 19, 1890, the following, among other resolutions, was adopted: "That there shall also be elected a general manager, whose authority shall be to have the general management of the business of the company"; and in pursuance thereof Graham was chosen to that position. The plaintiff, W. E. Baines, was a director, and also secretary and treasurer, of the corporation; but his duties as such were only nominal. Graham having entered into a contract with the corporation to build its road, plaintiff was employed to secure rights of way, and also performed other duties from the time of the organization of the company until March 5, 1894, when he was discharged by Graham. He thereupon filed in the office of the county clerk of Coos County his notice of lien on the roadbed, structure, etc., to secure the sum of \$12,750, and on April 18, 1894, the corporation being without funds, its general manager, in settlement of plaintiff's claim, executed to him on its behalf two promissory notes, each for the sum of \$4,000, payable in twelve and eighteen months, respectively, with interest at the rate of seven per cent per annum. The notes not having been fully paid this action was instituted April 25, 1900, and at the former trial it was held that the testimony, though controverted, was sufficient to be submitted to the jury as tending to show that the corporation was indebted to plaintiff (*Baines v. Coos Bay Nav. Co.* 41 Or. 135, 68 Pac. 397, 26 Am. & Eng. R. R. Cas. N. S. 412); and the conclusion then reached has not been changed by the evidence given at the subsequent trial, from which the jury might reasonably have inferred that a consideration existed for the execution of the notes.

1. Graham had no express authority to execute negotiable instruments on behalf of the corporation, and, the plaintiff having been a director and an officer thereof, and presumed to know the measure of power delegated, no apparent holding out of the general manager can be invoked in his behalf; and it remains to be seen whether the testimony indicates that Graham possessed implied authority to evidence the indebtedness of his principal by executing the notes in question.

2. The rule is general that no managing agent of a corporation, except the cashier of a bank, possesses implied power to bind it by issuing, accepting, or indorsing on its behalf negotiable instruments: 10 Cyc. 929; 3 Clark & Marshall, Private Corp., § 700; 2 Cook, Corporations, (5 ed.) § 719; *McCullough v. Moss*, 5 Denio, 567; *Culver v. Leovy*, 19 La. Ann. 202; *New York Iron Mine v. Negaunee Bank*, 39 Mich. 644; *Helena Nat. Bank v. Rocky Mt. Tel. Co.*, 20 Mont. 379 (51 Pac. 829, 63 Am. St. Rep. 628); *Sanford Cattle Co. v. Williams*, 18 Colo. App. 378 (71 Pac. 889). This is so because such paper, in the hands of an innocent holder, is subject practically to no defense, and to protect corporations from the fraud of their agents, for through them alone can they act, the law requires that such an agent must possess express authority before he can bind his principal by putting in circulation negotiable instruments: *Elwell v. Puget Sound & C. R. Co.* 7 Wash. 487 (35 Pac. 376).

Where, however, the exigency of a creditor's demand against a corporation, incurred in the legitimate exercise of its business, necessitates a speedy settlement, it has been held that its general manager, for lack of funds, possesses implied power to evidence the debt by executing on its behalf a promissory note therefor. Thus, in *Bates v. Kieth Iron Co.* 7 Metc. 224, the defendant's agent was authorized by one of its by-laws "to manage the affairs of

the corporation committed to his care, according to the best of his ability, and at all times exercise the powers committed to him according to his discretion, and promptly to collect all assessments or other sums that shall become due to the corporation, and disburse them according to the order of the board of directors, saving that the board of directors shall be a board of control over him, and whenever they shall give him special instructions he shall be bound strictly to adhere to them." The defendant being indebted to an employé and not having the money with which to pay him, its managing agent gave him its promissory note, and in an action to recover the sum due thereon it was held that, if the board of directors did not interfere to control the agent's proceedings, he had authority to employ workmen and carry on the business of the corporation, and to pay them its funds therefor, and for want thereof to give its notes in payment. In *Castle v. Belfast Foundry Co.* 72 Me. 167, the directors of the defendant corporation, at a meeting of the board, voted "that the president have full power and control of all the business of the company"; and in pursuance thereof such agent borrowed money with which to purchase materials to be used in conducting the business of the corporation, and, having given its promissory notes therefor, it was held that he had sufficient authority to evidence the debt in that manner.

3. In *Fitzgerald & M. Const. Co. v. Fitzgerald*, 137 U. S. 98 (11 Sup. Ct. 36), it was held that when an officer of a construction company had full control of the building of a railroad, and was charged with the general management of the business of the corporation, promissory notes given by him, in the absence of contrary instructions by the directors, for moneys used to pay off indebtedness of the company arising in the construction of a railroad, could not be considered as in excess of his powers. As illus-

trating the implied power possessed by a subordinate agent, in the absence of his superior, to bind his principal by contracts entered into on its behalf in cases of urgent necessity, see *Holt v. Cumming*, 102 Pa. St. 212 (48 Am. Rep. 199); *Terre Haute & I. R. Co. v. McMurry*, 98 Ind. 358 (49 Am. Rep. 752); *Pacific R. Co. v. Thomas*, 19 Kan. 256; *Union Pac. R. Co. v. Winterbotham*, 52 Kan. 433 (34 Pac. 1052). So, too, where the general manager of a corporation owns practically all its capital stock, and "is virtually the corporation itself" (*Atlantic, etc., R. Co. v. Reisner*, 18 Kan. 458), the validity of promissory notes executed by him on its behalf to evidence *bona fide* corporate debts has been upheld (*Castle v. Belfast Foundry Co.* 72 Me. 167; *First Nat. Bank v. G. V. B. Min. Co.* [C. C.] 89 Fed. 439). Thus, in *Africa v. Duluth News T. Co.* 82 Minn. 283 (84 N. W. 1019, 83 Am. St. Rep. 424), it was held that the president and general manager of a corporation, who possessed and exercised with its assent general and unrestricted charge and control of the management of its affairs, and who was the sole stockholder thereof, had implied authority to borrow money to pay and discharge maturing debts and obligations of the corporation, and to make and deliver for that purpose its promissory notes.

4. It will be remembered that, the defendant herein being without funds, Graham, as its general manager, executed to plaintiff its promissory notes to secure a discharge of the lien, which was evidently a pressing demand. As a speedy settlement of the claim became necessary to maintain the credit of the defendant, that it might continue the building of the railroad, we think the court could not say, as a matter of law, in view of the necessity adverted to, that Graham was without implied power to make the notes in question. The general manager of a corporation should not, except in cases of extreme necessity, be permitted to issue negotiable instruments without express authority,

even to evidence *bona fide* debts contracted by it in the legitimate exercise of its business; for, if he were invested with implied power in all cases, he might, by issuing promissory notes, impose upon the corporation excessive burdens and prevent an inquiry by the stockholders into the reasonableness of the creditor's claim thus approved by him. Where, however, the general manager of a corporation is practically the owner of all its capital stock, self-interest must necessarily prompt him to protect the rights of his principal in approving claims against it, in which case no valid reason can well be assigned why power to issue negotiable instruments to evidence debts incurred in the legitimate prosecution of the business of the corporation should not be implied. In the case at bar Graham was the subscriber for all the capital stock of the defendant corporation, and, though he had hypothecated a part of his stock, he was legally the owner thereof, and as such might have possessed implied power to make the notes sued upon, and, in our opinion, the testimony was sufficient to be submitted to the jury on that question.

5. The plaintiff's counsel contend that the court erred in permitting the defendant, over their objection and exception, to file a third amended answer, alleging a want of authority on the part of the general manager to execute the notes. The privilege of amending pleadings is a matter within the sound discretion of the trial court, and, as no abuse thereof is manifest herein, its action will not be disturbed.

For the error committed in charging the jury to find for the defendant, the judgment is reversed, and a new trial ordered.

REVERSED.

Argued 13 July, decided 8 August, 1904.

STATE EX REL. v. WILLIAMS.

[67 L. R. A. 167, 77 Pac. 965.]

MANDAMUS TO COMPEL ARREST FOR MISDEMEANOR WITHOUT WARRANT.

1. Mandamus ought not to issue directing public officials to proceed without a warrant and arrest certain named persons who are alleged to be continuously committing misdemeanors not in the presence of any court or officer.

CONSTRUCTION OF WRIT OF MANDAMUS — ARREST.

2. A writ commanding a peace officer to arrest and prosecute particular persons said to be guilty of sundry misdemeanors will not be construed as a direction to file formal charges against them before making the arrests.

MANDAMUS TO POLICE JUDGE.

3. A mandamus to a police judge directing him to issue bench warrants for all violators of a certain city ordinance who have forfeited their bail or not appeared for trial, would be ineffectual because of the possible death of many, and because some have deposited money in lieu of bail, and therefore are not within the terms of the writ.

COMMANDING ACT NOT ENJOINED BY LAW.

4. A mandamus ought not to issue directing a public officer to perform an act not enjoined upon him by law: as, for example, in view of a city charter providing for a clerk of the police court, who shall keep the seal of such court and affix it to the process thereof, it is not the duty of the judge to issue bench warrants, and he should not be commanded by mandamus to do so.

ADMISSIONS BY DEMURRER — LEGAL CONCLUSIONS.

5. Under the rule that a demurrer admits probative facts only, and not conclusions at all, an alternative writ of mandamus to a municipal judge to issue bench warrants, reciting merely that he neglects to issue them "as required by law," does not, as is necessary, show that it is incumbent on such judge to issue bench warrants, but states merely a legal conclusion.

MANDAMUS — MISJOINDER OF CAUSES.

6. A writ of mandamus may properly be directed to several officers directing each to perform one or more of several acts enjoined by law, the series of acts so commanded being necessary to secure to relator some legal right.

DIRECTING MAYOR TO ORDER CHIEF OF POLICE TO OBEY LAWS.

7. Though it is the duty of the mayor or executive board of a city, on receipt of satisfactory information, to direct the chief of police to enter gambling houses and arrest persons there found offending against the law, yet, it being made the duty of a police officer to inform against and prosecute persons whom he has reasonable cause to believe guilty of gambling, mandamus ought not to issue to the mayor to order the chief of police to prosecute gamblers, nor ought such writ to issue to the chief of police directing him to obey such order, for, it being the duty of the chief to suppress gambling, he does not need any special orders, and a writ to him alone directing the performance of his duty will be sufficient.

ORDERS OF SUPERIOR AS PROTECTION TO INFERIOR OFFICER.

8. An order by a superior to an inferior to perform or do an unlawful act or not to perform a duty required by law is void and affords no protection to the person receiving it. Thus, mandamus to a chief of police to prosecute gamblers will not be refused on the principle that an officer cannot be compelled to do what his superior officer has lawfully commanded him not to do, where the

mayor and the chief of police have entered into an unlawful conspiracy not to prosecute such offenders.

EFFECT OF SUSTAINING DEMURRER FOR MISJOINDER OF CAUSES.

9. The effect of sustaining a demurrer to a complaint for a misjoinder of several causes of complaint is to entirely obliterate the pleading, and the party must plead over or be nonsuited.

From Multnomah: JOHN B. CLELAND, ALFRED F. SEARS, JR., ARTHUR L. FRAZER, and MELVIN C. GEORGE, Judges, in joint session.

This is a mandamus proceeding, instituted on the relation of R. Livingstone and others against George H. Williams, as mayor of Portland; Charles H. Hunt, as chief of police; H. W. Hogue, as municipal judge; and Charles F. Beebe and others, as members of the executive board of that city—to compel the arrest and prosecution of certain persons for alleged violations of a clause of the city charter, of the provisions of a municipal ordinance, and of the requirements of a statute of the State prohibiting gambling. Alternative writs were issued, one to the members of the executive board as a body, and one to each of the other defendants, who severally demurred thereto on the grounds: (1) That they did not state facts sufficient to entitle the relators to the relief demanded; (2) that it appeared therefrom that a plain, speedy, and adequate remedy in the ordinary course of law existed for the suppression of the evil alleged; (3) that the court did not have jurisdiction of the persons of the defendants nor of the subject-matter involved; and (4) that several alleged causes of special proceedings were improperly united. These demurrers being overruled, and the defendants declining further to plead, the writs were made peremptory, and they severally appeal.

REVERSED.

For appellants there was an oral argument by *Mr. Joseph J. Fitzgerald*, with a brief over the names of *Lawrence A. McNary*, City Attorney, and *John P. Kavanaugh* to this effect.

I. Mandamus does not supersede legal remedies, but it is intended to supply the want thereof and prevent a failure of justice, and it will not lie where the law provides another plain, speedy, and adequate remedy: *B. & C. Comp. § 605*; *Ball v. Lappius*, 3 Or. 55; *Durham v. Monumental Silver Min. Co.* 9 Or. 41; *Oregon City v. Moore*, 30 Or. 221 (46 Pac. 1017, 47 Pac. 851); *Kimball v. Union Water Co.* 44 Cal. 173 (13 Am. Rep. 157).

II. Another legal remedy that will defeat mandamus is one that will place the relator in the same position he occupied before the omission of the duty complained of, or would have occupied had the duty been performed: *Coos Bay R. Co. v. Wieder*, 26 Or. 453 (38 Pac. 338); *Habersham v. Sears*, 11 Or. 431 (50 Am. Rep. 481, 5 Pac. 208); *State ex rel. v. Cone*, 40 Fla. 409 (74 Am. St. Rep. 150, 25 So. 279).

III. Mandamus will not be awarded to compel municipal officers to arrest and prosecute alleged offenders against the state laws and city ordinances where the state laws provide an adequate remedy by indictment or information for the same offense: *Highway Com'rs v. People*, 66 Ill. 339; *Highway Com'rs v. People*, 73 Ill. 203; *State ex rel. v. Yant*, 134 Ind. 121 (33 N. E. 896); *Tapping, Mandamus*, 76.

IV. The general statutes of this State do provide another plain, speedy, and adequate remedy for the arrest, prosecution, and punishment of offenders against the gambling laws by information or indictment, and prosecution in the circuit court or justice court of the district: *B. & C. Comp. §§ 1944, 1947, 1949–1958*.

V. Municipal officers will not be compelled by mandamus, without warrant or complaint, to arrest and prosecute persons charged with violation of the state laws and city ordinances: *State ex rel. v. Horner*, 16 Mo. App. 191; *Alger v. Seaver*, 138 Mass. 331; *State ex rel. v. Francis*, 95 Mo. 44 (8 S. W. 1); *People ex rel. v. Listman*, (82 N. Y. Supp. 784 (84 App. Div. 637)).

VI. When the writ is directed to an officer who is vested with judicial or ministerial discretion in relation to the performance of the duty enjoined, it will compel him to act, but not to decide in particular manner: *People v. School Trustees*, 42 Ill. App. 60; *Ex parte Hayes*, 26 Ark. 510.

VII. The writ cannot be awarded to compel a series of acts, or general course of conduct, where it is impossible for the court to supervise or control performance of the acts or duties: *Rosenfeld v. Einstein*, 46 N. J. L. 479; *Diamond Match Co. v. Powers*, 51 Mich. 145 (16 N. W. 314); *State ex rel. v. Associated Press*, 159 Mo. 410 (51 L. R. A. 151, 81 Am. St. Rep. 368, 60 S. W. 91).

For respondents there was an oral argument by *Mr. Martin L. Pipes*, with a brief over the name of *Pipes & Tift* and *Miller Murdock* to this effect.

1. Mandamus lies to compel municipal officers to perform specific duties in enforcing municipal law: *Goodell ex rel. v. Woodbury*, 71 N. H. 378 (52 Atl. 855); *Wood v. Strother*, 76 Cal. 545 (9 Am. St. Rep. 249, 18 Pac. 766); *State ex rel. v. St. Louis*, 134 Mo. 296 (56 Am. St. Rep. 503, 35 S. W. 617); *Re Whitney*, 3 N. Y. Supp. 838 (24 N. Y. S. R. 968); *People ex rel. v. Byrne*, 9 Abb. N. C. 127, note; *State ex rel. v. Police Board*, 10 Ohio Dec. Reprint, 256.

2. Mandamus lies to compel the judge to issue a warrant of arrest: *Benners v. State*, 124 Ala. 97 (26 So. 942); *State ex rel. v. McCutcheon*, 20 Neb. 304 (30 N. W. 58); *People ex rel. v. Swift*, 59 Mich. 529 (26 N. W. 694); *Attorney General ex rel. v. Police Justice*, 40 Mich. 631; *State ex rel. v. Laughlin*, 75 Mo. 358; *State ex rel. v. Cummings*, 17 Neb. 311 (22 N. W. 545); 1 Bishop, Crim. Proc. § 1403; Merrill, Mandamus, § 203.

3. Where the duty is of a public nature no demand is necessary: *Northern Pac. R. Co. v. Washington Ter.* 142 U. S.

492 (12 Sup. Ct. 283); *Oroville & V. R. Co. v. Plumas County*, 37 Cal. 354; *People ex rel. v. Reis*, 76 Cal. 269 (18 Pac. 309).

4. Where permissive language is used in conferring power upon an officer and the public or third persons have an interest in the exercise of the power, its exercise is imperative: *Kohn v. Hinshaw*, 17 Or. 308 (20 Pac. 629); *Smith v. King*, 14 Or. 10 (12 Pac. 8); *McLeod v. Scott*, 21 Or. 94 (26 Pac. 1061, 29 Pac. 1).

5. Discretion of an inferior officer must be exercised reasonably and fairly, and its abuse may be controlled by mandamus: *Ex parte Bradley*, 74 U. S. (7 Wall.) 377; *State ex rel. v. Lafayette County Court*, 41 Mo. 226; *Glencoe v. People*, 78 Ill. 389; *People ex rel. v. Superior Court*, 10 Wend. 285; *Stockton & V. R. Co. v. Stockton*, 51 Cal. 339; *Wood v. Strother*, 76 Cal. 545 (9 Am. St. Rep. 249, 18 Pac. 766); *McLeod v. Scott*, 21 Or. 94, 109 (26 Pac. 1061, 29 Pac. 1); *State ex rel. v. Higgins*, 76 Mo. App. 328.

6. The relators need have no special interest where the matter concerns a public duty: *State ex rel. v. Ware*, 13 Or. 380 (10 Pac. 885); *State ex rel. v. Grace*, 20 Or. 157 (25 Pac. 382); 13 Ency. Pl. & Pr. 632; *In re Whitney*, 3 N. Y. Supp. 838; *People v. Meakim*, 56 Hun, 626; *State ex rel. v. Francis*, 95 Mo. 44 (8 S. W. 1).

7. As to the claim that mandamus will not lie against a governor, and by analogy ought not to lie against the mayor, the authorities are in conflict, but we believe that the better reasoned ones are against the claim made by the defendants: *Moses, Mandamus*, 82; *Harpening v. Haight*, 39 Cal. 211; *State v. Noonan*, 59 Mo. App. 524; *Frank v. St. Louis*, 145 Mo. 600 (47 S. W. 508); *People v. Mayor*, 64 Hun, 408; *Dreyfus v. Lonergan*, 73 Mo. App. 336; *State ex rel. v. Born*, 97 Wis. 542 (73 N. W. 105); *State v. Ames*, 31 Minn. 440; *People v. Hastings*, 5 Ill. App. 436; *People ex rel. v. Morton*, 156 N. Y. 136 (41 L. R. A. 231, with note, and 66 Am. St. Rep. 547, with note).

MR. CHIEF JUSTICE MOORE, after stating the facts in the above terms, delivered the opinion of the court.

It is contended by defendants' counsel that errors were committed in overruling these demurrers. Let us first consider whether or not the alternative writs state facts sufficient to warrant the granting of the relief demanded. They show the right of the relators to institute these proceedings; allege the incorporation of the City of Portland, and the several duties of the respective defendants, so far as involved herein; that since March, 1903, defendants have wilfully conspired to obstruct and defeat the enforcement of the provisions of the city charter, of the municipal ordinance, and of a statute of the State prohibiting gambling, and to thwart the conviction and punishment of persons engaged in gaming, or who keep or frequent gambling houses, and refuse to perform the duties imposed upon them in relation to such prohibition; that every day and night since the unlawful agreement was entered into a number of persons have openly and notoriously been engaged in keeping and conducting gaming and gambling houses, rooms, and premises, and playing the games so prohibited, which places have been and now are kept and used as common gaming houses for playing therein for wager of money at games of chance, some of the persons so employed and of the rooms in which they are engaged being as follows: John Thomas, 130 Fifth Street, H. Shapiro, 185 Third Street, George Fuller, * * Fred Fritz, 242 Burnside Street, E. Blazier, 248 Burnside Street, and A. D. Martini, 81 First Street; that at all times and now the defendants had and have information satisfactory to each of them that such houses and rooms were and are constantly used for gambling, but, in pursuance of their unlawful agreement, the chief of police, with the sanction and approval of his codefendants, pretends to subscribe and verify complaints against such persons, feigning

to charge them severally, in due form of law, with violating the ordinances relating to gambling, files the same in the municipal court, and, without any order therefrom fixing their bail, induces them to deposit sums of money, pretending that they are in lieu of bail, and the municipal judge, in furtherance of such unlawful combination, professes to order such money forfeited and paid into the city treasury, the defendants intending that the persons so charged should not appear in court for trial, they consenting thereto, relying upon the defendants' advice that they were not to be tried on such charges if twice each month they would deposit the sums agreed upon as simulated bail.

It is also further alleged that in pursuance of such conspiracy all persons conducting common gaming houses, including those hereinbefore named, have been charged by the chief of police twice each month with the offense of gambling, and in every instance they deposited a specified sum of money in lieu of bail, which has invariably been forfeited, the municipal judge refusing to proceed with their trials; that at intervals between the time of such deposits the defendants had, and now have, satisfactory information, and know that the persons so charged are keeping gaming houses, but the defendants wilfully neglect and refuse to charge them therewith, or cause them to be arrested therefor, or to be brought to trial, and in doing so the defendants have not exercised any discretion, but act arbitrarily, and with intent to permit public gambling in violation of law; that the municipal judge, well knowing that the persons making such deposits are in the city, at their several gambling houses, engaged in playing prohibited games, wilfully neglects to issue bench warrants for their arrest, "as required by law," with intent that they shall continue to violate the city charter, municipal ordinance, and statute of the State, so as to derive

from them an illegal and corrupt revenue for the city; that the largest gambling house is known as the "Portland Club," at No. 130 Fifth Street, which is, and at all times mentioned herein has been, kept and conducted by Peter Grant, Jack Grant, Lawrence Sullivan, Harvey Dale, and Nate Solomon; that in March, 1903, and thereafter at regular intervals, the chief of police has pretended to file in the municipal court verified complaints against one of the persons last mentioned under the fictitious name of John Thomas, well knowing the true name of the person intended to be charged, who would thereupon deposit in that court, under pretense of bail, about \$250, but on November 23, 1903, the sum left for that purpose was \$300, which the judge pretended to forfeit—whereby gambling has continued in violation of law, and the persons engaged therein and pretended to be charged therewith and arrested therefor under the name of John Thomas have, in pursuance of such conspiracy, never appeared in the municipal court for trial; and that the relators have no plain, speedy, or adequate remedy in the ordinary course of law.

The four alternative writs are alike in every particular, except the thirty-seventh paragraph thereof, which relates to the respective commands enjoined upon the several defendants; the one addressed to the mayor, omitting the choice of showing cause, being as follows:

"Now, Therefore, you are commanded that immediately after the receipt of this writ you forthwith direct Charles H. Hunt, as chief of police of said city, to enter, or cause a proper police officer to enter, the common gaming houses described in this writ, and particularly the premises at 130 Fifth Street, known as the 'Portland Club,' which is a common gaming and gambling house, and forthwith arrest or cause to be arrested the person or persons who may be found there violating the gambling law and ordinances, and particularly the person who has heretofore

been charged by the said chief of police in the municipal court of said city with violating the laws and ordinances of said city under the name of John Thomas, and the persons to wit, Peter Grant, Jack Grant, Lawrence Sullivan, Harvey Dale, and Nate Solomon, who are keeping and using said gambling house, and to seize all instruments of gaming that may be found therein, and bring the same into the municipal court, and to vigorously prosecute said persons therefor, and that you show cause," etc.

The command addressed to the executive board is almost identical with that to the mayor, and that directed to the chief of police was to execute the orders of the mayor and of the executive board, as contained in the mandates to them. The municipal judge was required to perform the following service:

"Now, Therefore, you are commanded that immediately after the receipt of this writ you issue bench warrants for all persons charged with offenses against the ordinances of said city relating to gambling, whose bail has been forfeited by order of your court, and who have not appeared for trial in the several actions against them, and particularly for the persons charged under the name of John Thomas, charged in the months of May, June, July, August, September, October, and particularly about November 30, 1903, and that you cause the said persons to be brought before you and proceed to the trial thereof."

Section 194 of the charter of the City of Portland, which is relied on as imposing upon the mayor and the executive board the duties sought to be enforced against them in this proceeding, is, so far as deemed involved herein, as follows: "Whenever the mayor or the executive board ascertains or receives satisfactory information that any house, room, or premises within such city * * is being kept or used as a common gaming house or common gambling premises, for playing therein for wager of money at a game of chance, * * it shall be lawful for the mayor or the executive board to authorize and direct the chief of

police, or any officer of the force, to enter such house, room, or premises, and forthwith arrest all persons therein found offending against any law, and to sieze all instruments of gaming * * and bring the said articles into court": Sp. Laws 1903, p. 83. Assuming, without deciding, that the clause "it shall be lawful," in the section quoted, is not merely permissive, but mandatory, imposing upon the mayor and the executive board the duty of directing the chief of police as therein specified, had these officers the power, and could the court compel them, to order the arrest, without a warrant, of any person not found offending against any law? The statute prescribing when an arrest may be made without written authority is as follows: "A peace officer may, without a warrant, arrest a person,—(1) For a crime committed or attempted in his presence; (2) when the person arrested has committed a felony, although not in his presence; (3) when a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it": B. & C. Comp. § 1611. Ordinance No. 3983 of the City of Portland, approved October 13, 1883, prohibiting gambling, and in force when the writs herein were issued, imposes for a violation of its provisions a punishment by imprisonment not exceeding ninety days or by a fine not exceeding \$300, or by both such fine and imprisonment. It will thus be seen that by this municipal enactment the crime of gambling is only a misdemeanor, as it is likewise regarded by statute of this State: B. & C. Comp. § 1944.

1. It would have been lawful for the mayor or for the executive board to have directed the chief of police to enter any gambling house in the City of Portland and arrested all persons found therein offending against any law, for the individuals so discovered would be guilty of a crime committed or attempted in the presence of a peace officer:

B. & C. Comp. § 1611. When, however, the mayor and the executive board were commanded in the alternative writs, without either the filing of a complaint or the issuing of a warrant, to direct the arrest of the persons named, we do not think any authority existed therefor; for, if the persons designated were found offending against any law, the insertion of their names in the alternative writs was unnecessary, but, if not so found, their alleged crimes being only misdemeanors, and not committed in the presence of the court (B. & C. Comp. § 1615), it was powerless to command their apprehension: *State ex rel. v. Francis*, 95 Mo. 44 (8 S. W. 1). In that case it was held that a writ of mandamus would not be issued to compel the Board of Police Commissioners of the City of St. Louis to arrest and prosecute certain named persons for a violation of the law of Missouri prohibiting the sale of fermented liquors on Sunday. In rendering the decision Mr. Justice SHERWOOD, speaking for the court, says: "Again, on the mere admission of the respondents that four citizens have done certain acts, the latter are to be arrested and prosecuted without affidavit and without warrant. This is further, it seems to me, than the mandatory authority of a court extends. Indeed, I have found no precedent for a mandamus for the arrest of any one. It is the duty of a sheriff, as conservator of the peace, to cause all offenders against the law, in his view, to enter into recognizance with surety to keep the peace, etc.: 1 Rev. St. 1879, § 3889. It is also his duty to quell and suppress assaults and batteries, riots, affrays, and insurrections, to apprehend and commit to jail all felons and traitors, and execute all process directed to him by legal authority: 1 Rev. St. 1879, § 3891. And yet it is believed that no instance can be found where a mandamus has issued commanding a sheriff to quell a riot or to arrest a criminal. The fact that no such precedent can be found argues very strongly against the exercise of

such authority. It is very easy to see that, if the process of mandamus could be employed in this ordinary way, that extraordinary writ would soon descend from its high plane and become very commonplace."

2. To secure freedom from illegal restraint for trivial causes, the wisdom and experience of ages have sanctioned the use of certain forms of procedure which must be observed before an alleged criminal can lawfully be arrested for a misdemeanor not committed in the presence of a magistrate or of a peace officer. A formal charge must be made and filed, showing that the court has jurisdiction of the subject-matter and authority to issue a warrant, in pursuance of which a peace officer may apprehend the person therein named, and be exonerated from all consequences that may possibly result from a wrongful imprisonment, by producing the writ if it appears therefrom that the court issuing it had such jurisdiction, and there is nothing disclosed to notify him of any lack of such authority: Crocker, Sheriffs, § 48; Murfree, Sheriffs, § 1161; 3 Cyc. 880; 2 Am. & Eng. Enc. Law (2 ed.), 869, 893; *Savacool v. Boughton*, 5 Wend. 170 (21 Am. Dec. 181); *In re Way*, 41 Mich. 299, 304 (1 N. W. 1021). In *Goodell ex rel. v. Woodbury*, 71 N. H. 378 (52 Atl. 855), relied upon by the relators as supporting the judgment rendered herein, a writ of mandamus was issued to compel the chief of police of Manchester, N. H., to enforce the provisions of a statute of that State prohibiting the sale of intoxicating liquors; but the officer was commanded to prosecute, not to arrest, the persons named in the writ. In deciding that case Mr. Chief Justice BLODGETT, referring to the duties of the chief of police, says: "The defendant is not merely a peace officer; he is also a prosecuting officer. The ordinances of Manchester (1892) provide that 'he shall carry into execution within the city the laws of the State and all the ordinances of the city, and be vigilant to detect and

bring to punishment all violators thereof. * * He shall receive all complaints made to him of any violation of the laws or of any ordinance of the city, and shall, in behalf of the city, cause all offenders against such laws and ordinances to be promptly prosecuted before the Police Court of the City of Manchester, and shall attend, on behalf of the city, at their trial.'” In the case at bar the chief of police was required to arrest and vigorously prosecute the persons named in the alternative writ addressed to him, but, as such order was a recital of the language of the city charter (section 195), we do not think the command can be construed, in the extraordinary remedy invoked, as a direction to file formal charges against the persons so named, before arresting them, and that a reasonable interpretation of the language used means that the officer was required (1) to apprehend such persons; (2) to bring them into the municipal court; (3) to prefer charges against them; and (4) to secure the attendance of witnesses whose testimony might lead to their conviction.

The Congress of the United States, fearing an infringement of the citizen's right of locomotion, and believing that the constitution originally adopted did not sufficiently “secure the blessings of liberty,” guaranteed by that instrument, proposed at an early day and secured the ratification of the fourth amendment to the fundamental law, which, so far as applicable herein, is as follows: “The right of the people to be secure in their persons * * against unreasonable * * seizures shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing * * the persons * * to be seized.” In the case of *In re Way*, 41 Mich. 299 (1 N. W. 1021), Mr. Chief Justice CAMPBELL, commenting on the mode of apprehending persons, says: “It must not be forgotten that there can be no arrest without due process of law. An arrest without warrant has never been

lawful except in those cases where the public security requires it; and this has only been recognized in felony, and in breaches of the peace committed in the presence of an officer." In *Bright v. Patton*, 5 Mack, 534 (60 Am. Rep. 396), it was ruled that an officer had no right to arrest without a warrant, after an offense had been committed, where the punishment is only a fine and imprisonment in jail. The illegal arrest of a person without a warrant entitles him to compensation for the damages sustained by reason of the false imprisonment: *Thorne v. Turck*, 94 N. Y. 90 (46 Am. Rep. 126). In *McConnell v. Kennedy*, 29 S. C. 180 (7 S. E. 76), the court, in distinguishing between false imprisonment and malicious prosecution, says: "The foundation of the cause of action in the one case is the right which even a guilty man has to be protected against any unlawful restraint of his personal liberty, while in the other it is founded upon the right of an innocent man to be compensated in damages for any injury he may sustain by bringing against him a groundless charge, even though such charge may be presented and prosecuted in accordance with the strictest forms of law." The statute of this State, emphasizing the love of personal liberty entertained by a free people as expressed in the fourth amendment to the federal constitution, impliedly prohibits the arrest, without a warrant, of any person for the commission of a misdemeanor, unless the offense was attempted or consummated in the presence of a magistrate or of a peace officer (B. & C. Comp. § 1611); so that, if the chief of police had obeyed the command of the alternative writ directed to him, and, without a warrant, arrested the persons so designated, their alleged crimes being only misdemeanors, he would probably have been liable to them in nominal damages, at least, for a false imprisonment, unless he apprehended them in the act of violating the law, notwithstanding they may there-

tofore have been guilty of offending against the statute and city ordinances prohibiting gambling. "An officer," says the editor of the Am. & Eng. Enc. Law (vol. 19, p. 729, 2 ed.), "cannot be compelled to do more than the statute requires of him"; and hence the issuance of the alternative writs addressed to the mayor, to the executive board, and to the chief of police, in so far as they commanded the arrest without a complaint or warrant of the persons so named, was an exercise of power not authorized, and therefore void.

3. A compliance by the municipal judge with the command directed to him would have necessitated an examination of the journals of the municipal court from the time of its organization until the writ was returned to ascertain the names of the persons whose bail had been ordered forfeited and who had not appeared for trial in the several actions instituted therein against them, that bench warrants might be issued for their arrest, regardless of the fact that many of those intended to be included in the order may possibly have died in the long interim. The statute makes a distinction between bail and money deposited in lieu thereof (B. & C. Comp. § 1338), so that a literal compliance by that officer with the alternative writ directed to him to "issue bench warrants for all persons charged with offenses against ordinances of said city relating to gambling where bail has been forfeited by your court, and who have not appeared for trial in the several actions against them," would not have resulted in punishing the persons alleged to have been guilty of violating the law prohibiting gambling, nor possibly corrected the evil sought to be suppressed by these proceedings, assuming, as the writs allege and the demurrers admit, that in pursuance of the conspiracy entered into by the defendants money, in each instance, was deposited in lieu of bail.

4. The alternative writs, in referring to the duties imposed on the municipal judge, contained the following averment:

"Among the provisions of law not otherwise provided in said charter are that a defendant shall be admitted to bail by an order of the court, and after such order is made he may deposit in lieu thereof with the clerk the sum of money mentioned in the order, and if, without sufficient excuse, the defendant neglect or fail to appear for arraignment or upon any other occasion when his presence in court may be lawfully required, the court must direct the fact to be entered in the journal, and the undertaking of bail, or the money deposited in lieu thereof, as the case may be, is thereupon forfeited. When by reason of the defendant's neglect or failure to appear he has incurred a forfeiture of his bail or money deposited in lieu thereof, it is the duty of the court, by an order entered upon its journal, to direct the arrest of the defendant, and his commitment to the officer to whose custody he was committed at the time of giving bail, and his detention until legally discharged. It is then the duty of the court to proceed to trial in ordinary course until final determination."

The charter provides that the municipal court shall be a court of record having a seal: Section 328. All proceedings before such court or the judge thereof are governed and regulated by the general laws of the State applicable to the justice of the peace or justice's courts in like cases, except as in the charter otherwise provided: Section 332. The executive board is authorized to appoint a clerk of such court, who is to keep the seal thereof and to affix it to any process emanating therefrom: Section 331. The demurrers having admitted the duty of the municipal judge to enter in the journal of his court a memorandum of the forfeiture of the money deposited in lieu of bail, and of orders in such cases directing the arrest of the persons whose money had been forfeited, as alleged, it must be presumed, in the absence of any aver-

ment to the contrary, that such official duty has been regularly performed (B. & C. Comp. § 788, subd. 15), and, this being so, the issuing of the bench warrants did not devolve upon the judge, as stated in the command addressed to him, but on the clerk of the municipal court, who is required to affix the seal thereof to any process: Charter of Portland, § 331.

5. Though it is alleged in the alternative writs that the municipal judge wilfully neglects to issue bench warrants, "as required by law," for the arrest of persons whose money deposited in lieu of bail has been declared forfeited, it is not averred that it is incumbent upon him to issue such warrants, unless the duty in this respect can be implied from the qualifying phrase "as required by law." It was necessary to state, as a major premise: (1) The facts constituting the duty which the law enjoins on the defendants; and, as a minor premise, (2) their failure, neglect, or refusal to comply therewith, from which the court deduces the conclusion sought to be established: Bliss, Code Pl. (3 ed.) § 137. The writs having stated that the municipal judge neglected to issue bench warrants "as required by law," the phrase quoted is only a legal conclusion, and not the averment of a material fact, stated as the foundation of an enforceable right. It will be remembered that the sufficiency of the alternative writs was challenged by demurrer, and in such case the probative facts alone are admitted, and not the conclusions of law so stated: *Longshore Printing Co v. Howell*, 26 Or. 527 (38 Pac. 547, 28 L. R. A. 464, 46 Am. St. Rep. 640). It not having been alleged that it was incumbent upon the municipal judge to issue bench warrants, and, as we have seen this duty imposed by the city charter on the clerk of the municipal court, it follows that the alternative writs do not state facts sufficient to constitute a cause of special proceeding against the former.

6. Considering the fourth ground of the demurrer interposed to the alternative writs—that several causes of alleged special proceedings have been improperly united—it has been held that one writ of mandamus against all officers concerned in the separate but coöperative steps for levying and collecting a tax is the proper and effective remedy to secure its exaction: *Labette County Com'rs v. United States ex rel.* 112 U. S. 217 (5 Sup. Ct. 108). In deciding that case Mr. Justice MATTHEWS, in speaking for the court on the procedure, said: "There is no incongruity in such a writ. It would not be complete or effective without it embraced all the particulars which, in law, are essential to the full duty contemplated by it, the performance of which is necessary to secure its benefits to the party who sues it out. So here the object of this writ, though including many particular steps in obeying it, is nevertheless single, in that it is intended to obtain an end which is the result of the means prescribed. The command of the writ is to perform the general duty, which is obeyed by performing the successive steps which constitute it. Clearly, the writ would not be chargeable with duplicity if addressed to one person, although it commanded the performance of a series of acts, each of which was a condition of the performance of its successor, where the right of the relator consists in the result legally flowing from the combined whole. It can make no difference in principle that in a particular case the law, instead of casting the performance of the entire duty upon a single person, has divided it among several, each to perform but one act in the series, and each acting independently, and not as responsible to any of the others, but all required to coöperate in the attainment of the single result, and by a continuous and uninterrupted succession so as to preserve the integrity and unity of the performance of an entire duty. The relator is entitled to an effective writ, and he can have

it only on the terms of joining in its commands all those whose coöperation is by law required, even though it be by separate and successive steps in the performance of those official duties which is necessary to secure to him his legal right. Otherwise the whole proceeding is liable to be rendered nugatory and abortive." To the same effect, see *State ex rel. v Bailey*, 7 Iowa, 390.

7. In the case at bar it will be remembered that section 194 of the city charter provides that it shall be lawful for the mayor or the executive board, on the receipt of satisfactory information, etc., to direct the chief of police to enter common gaming houses in the city and arrest all persons therein found offending against any law. The statute of this State makes it the duty of a police officer to inform against and diligently prosecute any and all persons whom he shall have reasonable cause to believe guilty of violating the provisions of an act prohibiting gambling: B. & C. Comp. § 1950. This enactment made the chief of police of the City of Portland a prosecuting officer (*Goodell ex rel. v. Woodbury*, 71 N. H. 378, 52 Atl. 855), and, if he had reasonable cause to believe that any person was violating such law, also imposed on him the duty of enforcing its provisions without any direction to that effect from the mayor or from the executive board. The obligation thus enjoined results from an office (B. & C. Comp. § 605), and for a refusal by the chief of police to comply with the duty which the law prescribes a peremptory writ of mandamus addressed to him would be as effectual to suppress public gambling as though the mayor and the executive board were also commanded to direct him to do the same thing. This result can be secured by commanding the chief of police to perform a plain duty devolving upon him, and, as a writ of mandamus will not lie to compel the execution of vain and useless things (19 Am. & Eng. Enc. Law, 2 ed. 757), no necessity existed for

joining a cause of special proceeding against the mayor or the executive board, the discharge of whose duties, if it be assumed they are imperative, were not an indispensable or successive step in the procedure to suppress the evil of which the relators complain.

8. In discussing this feature of the case we have not overlooked the legal principle that a public officer cannot be compelled to do a particular act which his superior in office has lawfully ordered him not to do: 19 Am. & Eng. Enc. Law (2 ed.), 731; *Butterworth v. United States ex rel.* 112 U. S. 50 (5 Sup. Ct. 25). Assuming, as the demurrers admit, that a conspiracy existed whereby the defendants sought to raise a revenue by a method tantamount to licensing public gambling, the scheme alleged to have been adopted was unlawful, and, the agreement entered into being void, the chief of police was not bound thereby, nor under any obligation to obey the orders of his superiors, the mayor or the executive board; and hence mandamus will lie to compel him diligently to prosecute any and all persons whom he has reasonable cause to believe guilty of a violation of the provisions of the statute prohibiting gambling: B. & C. Comp. § 1950; *Goodell ex rel. v. Woodbury*, 71 N. H. 378 (52 Atl. 855).

9. The relators are entitled to an effective writ, and, having prayed for greater relief than they of right can demand, an amendment may be desired. The statute prescribes what shall constitute the pleadings in mandamus proceedings, and provides that these formal allegations of the parties are to have the same effect, and may be amended in the same manner, as pleadings in an action: B. & C. Comp. § 612. In *State ex rel. v. Crites*, 48 Ohio St. 142 (26 N. E. 1052), it was ruled that where, upon a petition in mandamus, an alternative writ is issued commanding a number of acts, either separate or connected, to be done by the defendant, the relator is entitled to a peremp-

tory writ for such distinct acts or parts of connected acts as he may show a right to have performed, where there is no such mutual dependence between the several acts or parts of acts that they cannot be separated or divided. A mandatory writ, properly framed, alleging the required facts, and addressed to all the officers of the City of Portland who are indispensable in taking the necessary successive steps required successfully to prosecute persons for violating the law prohibiting gambling, will, in our opinion, tend to suppress the evil. If the chief of police refuses or wilfully neglects to inform against and diligently prosecute any and all persons whom he shall have reasonable cause to believe guilty of a violation of the provisions of the act prohibiting gambling, he shall be deemed guilty of a misdemeanor, and on conviction thereof in a criminal action instituted for that purpose will be punished and the court so trying him will declare his office vacant for the remainder of his term: B. & C. Comp. § 1951. The command of an alternative writ of mandamus is equivalent to a conclusion of law, deducible from the facts alleged, showing the particular act which the law specifically enjoins as a duty resulting from an office, trust, or station (B. & C. Comp. § 605); the failure, neglect, or refusal of the defendant to comply therewith; and the right of the relator to insist upon its specific performance. It is the mandatory part of the writ, however, that a party defendant must look to discover the specific act which he is commanded to perform. Though it may be possible that the right to a part of the relief sought against the chief of police may be stated in the writs, the rule in this State is that, when a demurer to a complaint is sustained on the ground that several causes of action have been improperly united, the complaint is completely overthrown, and the plaintiff can only proceed by filing an amended complaint

containing the cause of action which he elects to pursue: *Cohen v. Ottenheimer*, 13 Or. 220 (10 Pac. 20).

As an alternative writ of mandamus stands for a complaint in an ordinary action (*McLeod v. Scott*, 21 Or. 94, 26 Pac. 1061, 29 Pac. 1), the judgment must be reversed, the peremptory writs set aside, and the cause remanded, with directions to sustain the demurrers in the particulars indicated herein, and for such other proceedings as may be necessary, not inconsistent with this opinion; and it is so ordered. REVERSED.

Argued 9 June, decided 11 July, 1904.

FLANAGAN ESTATE v. GREAT CENT. LAND CO.

[77 Pac. 485.]

45	335
48	132

CONSTRUCTION OF CONTRACT BETWEEN VENDOR AND PURCHASER.

1. A contract of sale having provided that the vendee should pay a certain part of the purchase price on the day the contract was signed, and should within ten days thereafter deposit a further sum to the credit of the vendors, and should "within one year thereafter" make another payment, the word "thereafter" refers to the time of executing the contract, and not to the expiration of the ten days.

WHEN ESCROW BECOMES OPERATIVE.

2. A deed deposited in escrow does not become operative to convey the title until the performance of the conditions or happening of the event on which it was intended to be delivered to the grantee designated, where there is no incapacity on the part of the grantors.

CONVEYANCE NOT CONSTITUTING A BREACH OF CONTRACT.

3. Plaintiff's vendors, as sole heirs to certain real property, entered into a written contract for the sale thereof to defendant, the consideration to be paid in several instalments at times provided in the contract. The contract provided that, when a certain sum had been paid, the vendors would execute a deed to be delivered to a trustee in escrow until the whole amount should be paid, which was done, but subsequently, and prior to another payment on the purchase price becoming due, the vendors formed a corporation and conveyed their interests to it, reciting however that the conveyance was made subject to the rights of the grantee in the escrow deed. *Held*, that such conveyance was not a breach of the contract to convey, since it did not carry even enough of a title to require a suit to declare the corporation a trustee, the grantee evidently taking in subordination to the rights of the vendee.

RIGHT OF EQUITY TO DECREE STRICT FORECLOSURE.

4. A suit to obtain a strict foreclosure of a contract to convey land is inherently an admission of a subsisting right in the vendee and is not a claim of forfeiture, so that equity has jurisdiction.

STRICT FORECLOSURE NOT AFFECTED BY STATUTE.

5. Section 423, B. & C. Comp., providing for the foreclosure of liens and the sale of the property subject thereto, applies only to security debts, and does not affect the right to decree strict foreclosure of the rights of a vendee in a contract to convey land.

EQUITABLE RIGHTS UNDER CONTRACT TO CONVEY LAND.

6. The execution of a contract to convey land creates between the parties certain equitable and reciprocal rights as to the title and the payment of the purchase price that can be adjusted only in equity.

ENFORCING STRICT FORECLOSURE.

7. The remedy of strict foreclosure is a harsh one and will be enforced only in the sound discretion of the court, depending upon the varying conditions presented.

STRICT FORECLOSURE—REASONABLE TIME FOR PAYMENT.

8. Parties seeking strict foreclosure must have done equity as a condition of asking it, and must therefore allow a reasonable time to make any delinquent payments.

WHAT IS A REASONABLE TIME.

9. What will be a reasonable time within which defendant, in a strict foreclosure proceeding, shall make payments of the unpaid portion of the purchase price under a contract for the sale of land, rests mainly in the sound discretion of the court, time being allowed in proportion to the size of the debt.

EXAMPLE OF RIGHT TO STRICT FORECLOSURE.

10. Where land was sold under a contract expressly showing the parties to have intended that the agreement should cease to be obligatory on the vendors when the vendee made default in payment of the purchase price, and it appeared that of the stipulated consideration of \$50,000, \$13,250 had been paid when a default occurred, leaving a balance due, after deducting interest, amounting to \$41,100, a strict foreclosure is not inequitable, though under such circumstances the time for making the final payment should be extended six months.

IDEM.

11. A decree of strict foreclosure of a vendor's lien under a contract for the sale of land requiring the vendee to pay the balance due on the purchase price at a date when part of the consideration had not yet become due, or suffer foreclosure should be modified by a reasonable enlargement of the time for payment.

From Coos: JAMES W. HAMILTON, Judge.

Suit by the Flanagan Estate, a corporation, against the Great Central Land Company and others. On July 25, 1902, Florence Sheridan and others, being the sole heirs at law of Patrick Flanagan, deceased, gave to one H. Sengstacken the following agreement in writing:

“For Value each for him or herself agree that they will convey to H. Sengstacken all of the interest which I have in and to the real property owned by my father, P. Flanagan, at the time of his death on what is known as Pony Slough and known as the Pony Slough Tract and including the land known as Centerville and the tide-land abutting owned by said estate and the whole including about six hundred acres; *provided*, that the said Sengstacken shall pay to us this day the sum of One Thousand (\$1,000.00)

Dollars, and shall within ten (10) days thereafter deposit 25 % of (\$49,000) Forty-nine Thousand Dollars, in the Flanagan & Bennett Bank to our credit and subject to our order, and shall within one year thereafter deposit in said bank fifty per cent of said Forty-nine Thousand (\$49,000.00) Dollars with interest thereon at the rate of 6 % per annum, and shall within two years from this date also pay the remaining 25 per cent of said forty-nine thousand (\$49,000.00) dollars with interest thereon at the rate aforesaid.

Upon the first 25 per cent of the \$49,000.00 being deposited as aforesaid each for himself or herself agree to make, execute, acknowledge and deliver to Flanagan & Bennett Bank a deed of all of his or her interest to the real property already referred to in which deed Henry Sengstacken or to whom he assigns this contract on the back hereof shall be the grantee, and said bank shall hold the deed in escrow until the purchase price and interest aforesaid shall have been fully paid, or until default be made in any payment, and all payments, except the one thousand (\$1,000.00) dollars shall be made to said bank for the grantors aforesaid, the One Thousand (1,000.00) Dollars payment to be made to E. G. Flanagan for the grantors aforesaid.

If any default be made in any payment the Bank shall immediately return all deeds to the grantors, it being understood by the bank that time is of the very essence of the contract.

All conveyances shall contain covenants of warranty.

In case of default in any payment all previous payments are hereby declared forfeited to the grantors aforesaid.

The grantors also agree that his or her wife or husband shall each for him or herself join in the conveyance aforesaid.

The purchase price is Fifty Thousand (\$50,000.00) Dollars, and the one thousand dollars aforesaid shall form a part of the purchase price after the first 25 % payment is made, but prior to that time, it shall be considered as a consideration for the option only.

Time is especially and peculiarly made the essence of

this contract and no verbal extension of time shall in any way be considered or affect this contract in any ways, and it is expected and understood that in case of any default of any payment all previous payments shall be forfeited to and retained by the grantors, and in such event they intend to convey the land forthwith to another, and they shall not be required to bring any suit to declare the forfeiture."

Sengstacken paid the \$1,000 on the day of the execution of the agreement. On August 2, 1902, he assigned and set over to the defendant, the Great Central Land Company, a corporation, all his interest in the agreement, which company has since continued to be the owner and holder thereof. Later, the company paid to the Flanagan & Bennett Bank, to the credit and subject to the order of the vendors in the agreement, 25 per cent of the remaining \$49,000, being \$12,250, whereupon, on August 20, 1902, the vendors executed, in accordance with the terms of their undertaking, a deed to the land company for the premises designated, and delivered the same to the Flanagan & Bennett Bank, to be delivered to said company when the stipulated payments of that which remained due of the purchase price were made. The plaintiff, the Flanagan Estate, was subsequently duly incorporated and organized by the vendors, who became and were the owners of the entire stock thereof, and on September 30th they conveyed the premises in question to the corporation, but subject to the contract of sale or agreement above set forth, and the conveyance to the Great Central Land Company, evidenced by the deed deposited in escrow with the Flanagan & Bennett Bank, and transferred and set over unto it all their right, title, and interest in and to the contract. The land company having failed to make payment of the additional 50 per cent of the \$49,000 on or prior to the 25th day of July, 1903, the plaintiff, at 12 o'clock P. M. of that day, by notice to the land company, declared the con-

tract forfeited, and demanded of the Flanagan & Bennett Bank a return of the deed held by it in escrow, the demand being at once complied with. This suit was instituted to obtain a strict foreclosure of the contract of sale or agreement. Two defenses were interposed: (1) That defendant, the Great Central Land Company, was entitled until August 4, 1903, to make the second payment, but was precluded therefrom by plaintiff's previous declaration of forfeiture and withdrawal of the escrow, contrary to the stipulations of the contract; and (2) that the vendors have since the execution of the contract conveyed all their interest in the premises to the plaintiff, which company has failed and neglected to execute and deposit with the Flanagan & Bennett Bank a deed conveying the same to the land company. The trial court decreed a strict foreclosure, and the defendant, the Great Central Land Company, appeals. MODIFIED.

For appellant there was a brief over the name of *McKnight & Seabrook*, with an oral argument by *Mr. Ephraim Baynard Seabrook*.

For respondent there was a brief and an oral argument by *Mr. Joseph W. Bennett*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion of the court.

1. The first contention in logical order to be noticed is that the forfeiture was prematurely declared, it being insisted by counsel for the defendant land company that the third payment of 50 per cent of the \$49,000 remaining of the purchase price after the payment of the \$1,000 was not then due and payable. The position depends upon the proper interpretation of the contract, the plaintiff contending that the payment in question fell due July 25, 1903. The agreement or contract, as will be noticed, provides that Sengstacken shall pay on the day which it bears

date the sum of \$1,000, "and shall within ten (10) days thereafter deposit 25 per cent of (\$49,000.00) Forty-nine Thousand Dollars, in the Flanagan & Bennett Bank to our credit and subject to our order, and shall within one year thereafter deposit in said bank fifty per cent of said Forty-nine Thousand (\$49,000.00) Dollars with interest thereon at the rate of 6 per cent per annum." The inquiry centers about the employment of the word "thereafter," where found the second time in the excerpt. Does it bear relation to the date of the contract and that of the payment of the \$1,000, or to the date of the deposit of the 25 per cent of the balance of the purchase price designated? By pursuing the contract further, it will be found that the stipulation touching the last payment is that it shall be made two years after its date, so that all payments save this one are unmistakably fixed with reference to the date of the execution of the contract, and it is highly improbable that the payment in question should have been fixed with reference to some other date. Indeed, a critical reading of the conditions does not seem to us to lead to such a result, and we are firmly of the opinion that the contention is without merit.

2. It is next insisted that the deed by the Flanagan heirs, the vendors in the contract, to plaintiff carried the title of the premises to it, so as to defeat the purposes of the escrow, which is tantamount to, or is in itself, a breach of the contract on their part, and for that reason plaintiff cannot insist upon the remedy sought, the plaintiff not having placed in escrow a deed executed by it to the land company to be delivered upon like conditions as the former. The rule seems to be well established that a deed deposited in escrow does not become operative to convey the title until the performance of the conditions or happening of the event upon which it was intended to be delivered to the grantee designated, except in certain cases

arising through incapacity of the grantors, where by fiction of law it is allowed to take effect from the first delivery: 1 Devlin, Deeds (2 ed.), § 328; *Prutsman v. Baker*, 30 Wis. 644 (11 Am. Rep. 592); *Taft v. Taft*, 59 Mich. 185 (26 N. W. 426, 60 Am. Rep. 291); *Andrews v. Farnham*, 29 Minn. 246 (13 N. W. 161); *Cannon v. Handley*, 72 Cal. 133 (13 Pac. 315).

3. An inspection of the provisions of the deed to the Flanagan Estate will disclose, however, that it was not the purpose of the Flanagan heirs thereby to supersede the escrow, or to defeat the title that was intended to be conveyed by the latter instrument at the happening of the events upon which it was to become operative as a conveyance. By express condition the deed was made subject to the contract, and to the conveyance to the land company evidenced by the escrow, which we are impressed was effective to subordinate any title that may have passed thereby to the title that would have been acquired through the escrow if the conditions had come to pass upon which it was so placed. The fact that the plaintiff knew of the escrow, and of the terms and conditions upon which it was to become operative, would not alone have been effective to subordinate its title to that which would have ripened by the escrow taking effect as a deed, but it would be held, upon principles of equity, to have acquired the legal title in trust for the defendant land company. This, however, would not obviate the objection of the defendant, because it was the purpose of having the deed deposited in escrow to avoid the possibility of trust relations thus arising, and the necessity of requiring their enforcement so as to obtain the legal title. We think, however, as indicated above, that the conditions of the deed to the Flanagan Estate of themselves subordinated its title to that which would have accrued to the land company through the escrow, had the conditions upon which it was so placed come to pass; hence

we conclude that the second objection is not well asserted.

4. The next objection pertains to the relief sought, it being insisted that the court ought not to decree a strict foreclosure under the conditions prevailing. A forfeiture is not insisted upon here, and, if it were, equity would not enforce it. While it might refuse in many instances to interfere for the relief of an obligor against forfeiture for breach of an obligation, it will never interpose to declare a forfeiture, that being a matter, if insisted upon, entirely for the law side of the court. The plaintiff, by the act of instituting a suit for a strict foreclosure, recognizes the agreement as still in force and presently subsisting, for its purpose is to get rid of the equity of the land company by obtaining a decree barring it forever. The plaintiff thereby admits that the land company has an equity in the premises which plaintiff's predecessors by the terms of the contract agreed to convey, but submits that the company should be foreclosed thereof by reason of not having fulfilled the stipulations therein contained upon its part.

5. It was once a mooted question whether strict foreclosure could be at all maintained in this State, in view of the provisions of our statute with relation to the foreclosure of liens (B. & C. Comp. § 423), but it has been settled in favor of the remedy, as applied to contracts for the sale of land, in *Security Sav. Co. v Mackenzie*, 33 Or. 209 (52 Pac. 1046), where the lien thereby acquired is differentiated from the lien acquired for the security of some debt, which latter is alone declared to be within the intendment of the statute.

6. By the contract of sale an equitable conversion takes place, the vendee being deemed the owner of the land in equity, and the vendor to have a lien thereon for the purchase money, but at law these relations are not recognized. The lien suggested is known in the books as a "vendor's

lien," but does not exist in this State after title has passed: *Frame v. Sliter*, 29 Or. 121 (45 Pac. 290, 34 L. R. A. 690, 54 Am. St. Rep. 781). Its only existence, therefore, is upon the idea, which is nearly if not quite a fiction, that the title has passed when it has not, and that the vendor retains a lien upon the land which has passed to the vendee in equitable contemplation, but has not in law or in reality, the prime fact being that the legal title is reserved pending compliance on the part of the vendee with the conditions upon which it is to be conveyed. "And the so-called 'lien,'" as said by Mr. Justice BEAN in *Security Sav. Co. v. Mackenzie*, 33 Or. 209 (52 Pac. 1046), "is simply the vendor's right to enforce his claim for the purchase money against or out of the vendor's equitable estate"—not his legal estate, for he has none. The conversion spoken of entails equitable remedies, hence the vendor may invoke equitable cognizance by foreclosure to cut off or bar the vendee's interest, it being an equity of redemption, on the supposition that that is done which ought to be done.

7. This much being settled, it does not follow, however, that the court will always declare a strict foreclosure of the contract. It may also decree a foreclosure by a sale of the land in the ordinary way, although the title has not passed from the vendor, dependent upon the exigencies and equities of the case: *Security Sav. Co. v. Mackenzie*, 33 Or. 209 (52 Pac. 1046); *Vail v. Drexel*, 9 Ill. App. 439. Mr. Story says: "The usual course of enforcing a lien in equity, if not discharged, is by a sale of the property to which it is attached" (2 Story, Eq. Jur., 10 ed., § 1217), and this in connection with his discussion of the nature of the vendor's rights and remedies in a case like the present. "In this country, as a general rule," says Mr. Justice BERRY in *Wilder v. Haughey*, 21 Minn. 101, 103, "a sale is almost universally regarded as the just and appropriate

remedy." See also, *Jefferson v. Coleman*, 110 Ind. 515 (11 N. E. 465). And, speaking relative to the conditions under which a strict foreclosure would be proper, Mr. Justice NORVAL, in *Harrington v. Birdsall*, 38 Neb. 176, 186 (56 N. W. 964), says: "The remedy by strict foreclosure of land contracts cannot be resorted to in all cases. The remedy being a harsh one, courts of equity will decree a strict foreclosure only under peculiar and special circumstances. Applications of that character are addressed to the sound legal discretion of the court, and they will be granted in cases where it would be inequitable to refuse them. If the vendee or purchaser has not been guilty of gross laches, nor unreasonably negligent in performing the contract, a strict foreclosure should be refused on the ground that it would be unjust, even though the vendee may have been slightly in default in making a payment. So, for the same reason, a strict foreclosure will be denied where the premises have greatly increased in value since the sale, or where the amount of unpaid purchase money is much less than the value of the property. On the other hand, if the vendee, without sufficient excuse, fails to make his payments according to the stipulations of his contract, and for an unreasonable time remains in default, the vendor may have a strict foreclosure of the contract for the sale and purchase of the land, unless some principle of equity would be thereby violated." And this court has given utterance to a similar view in *Sievers v. Brown*, 34 Or. 454 (56 Pac. 171, 45 L. R. A. 642), which is especially applicable to the case at bar, wherein Mr. Justice MOORE says: "The justice of the rule announced in England and followed in Wisconsin may well be doubted, and particularly so when the vendor has received a large portion of the purchase money, in which case equity would seem to demand that the premises be sold to satisfy the balance due on the contract, upon the payment of which

the vendee should be entitled to the remainder of the money derived from such sale." Thus we find that strict foreclosure is the exception, not the rule, but, if required by the equities of the case, the court will not hesitate to enforce it.

8. Of the stipulated consideration of \$50,000, \$13,250 has been paid. The balance, if interest for two years be added to it at 6 per cent per annum, would amount to \$41,160. Deducting this from the original, we have \$8,840, a considerable sum, as the measure of the defendant land company's equity of redemption, if the value of the land remains the same to this time as the estimate the parties put upon it when the agreement was entered into. Assuming that such is the case, there are still other considerations to be taken into account in determining whether there should be a strict foreclosure. It was the intentment of the parties that the agreement should cease to be obligatory upon the vendors when the vendee made default in payment, and at law the stipulation could have been insisted upon. But plaintiff, having gone into equity, must at least do equity, else the court would not grant any relief. Having admitted that defendant was not yet precluded from making payment and acquiring title to the land, the subject of the contract, plaintiff must allow a reasonable time in which to make the payment, otherwise the foreclosure would be tantamount to a declaration of forfeiture, which, as we have seen, equity will not entertain affirmatively.

9. As to what time is reasonable, there appears to be no positive rule, it resting mainly within the sound discretion of the court. Under the English chancery it was six months, and if the debt was large another six months was usually granted: 2 Jones, Mortgages (2 ed.), §§ 1563, 1565; *Vail v. Drexel*, 9 Ill. App. 439.

10. While, however, the defendant is conceded still to

have an equity in the premises, it has not sought to reinstate itself by tendering or offering to make the overdue payment, but stands upon technical defenses, though insisting upon the broadest equities. By the agreement, defendant is not obligated to pay anything more if it does not desire to do so, and no deficiency decree can be obtained against it. There is, therefore, not that reciprocity of remedies that ordinarily exists in foreclosure cases, and it is not in as good a position to insist upon the largest latitude possible for its redemption as a debtor resting his equity of redemption upon the legal title. We conclude, therefore, that it would not be inequitable to grant a strict foreclosure in the present case.

11. The decree complained of, however, required the payment by the defendant land company of the full stipulated consideration at a date when part of it had not yet become due, or be foreclosed. This, we are impressed, did not give time enough for that purpose, and, considering the large amount involved, another six months will be allowed from the date of the entry of the decree here in which to make such payment. In all other respects the decree will be the same as rendered by the trial court.

MODIFIED.

Argued 5 July, decided 1 August, rehearing denied 6 October, 1904.

STATE v. EGGLESTON.

[77 Pac. 738.]

ADULTERY — CERTAINTY OF INFORMATION.

1. An information charging that defendant, on a specified day, in a certain county in the state, then and there being, did then and there unlawfully and feloniously commit the crime of adultery with a female commonly known by the name of C., he, the defendant, then and there being a married man, and the husband of A., and she, the said C., not being his wife, sufficiently charges that defendant was on the date of the alleged crime the husband of A., without the phrase "then and there" being repeated before the phrase "the husband of A."

ADULTERY — EVIDENCE OF WOMAN'S REPUTATION.

2. In a prosecution for adultery evidence that the female participant had an evil reputation for unchastity is admissible against the man.

ADULTERY—EVIDENCE OF PREVIOUS SIMILAR ACTS.

3. On a prosecution for adultery, evidence that defendant and the female participant had previously committed adultery at other times and places than the time and place charged in the information is admissible as tending to show the social relationship of the parties at the time stated in the charge.

INSUFFICIENCY OF EVIDENCE—REQUESTED INSTRUCTION.

4. Where the trial court was not requested to instruct the jury to acquit the defendant in a criminal case by reason of any failure of proof, it will be presumed, on appeal from a conviction, that the evidence was sufficient.

INSTRUCTION—PROOF OF LOCALITY.

5. Error is not assignable for failure of the trial court to charge that the jury must find the crime to have been committed in the county as laid, unless a request to that effect was proffered.

CURING ERROR BY INSTRUCTION.

6. Error in admitting testimony which the court subsequently concludes was incompetent is cured by a statement withdrawing such testimony and an instruction at the close of the case to disregard it.

ADULTERY—EFFECT OF DISCHARGING ONE PARTICIPANT.

7. Either party to an act of adultery may be convicted though the other may have been acquitted or not prosecuted.

MARRIAGE—SUFFICIENCY OF EVIDENCE.

8. The evidence of eyewitnesses to the ceremony is sufficient in both civil and criminal cases to prove a marriage.

PRESUMPTION AS TO CONTINUANCE OF MARRIAGE.

9. A marriage shown to have existed is presumed to continue until the contrary appears.

ADULTERY—EVIDENCE OF AMOROUS DISPOSITION.—OTHER CRIMES.

10. Evidence of an adulterous or amorous disposition on the part of defendant in a prosecution for adultery and of the other participant is a circumstance proper for the consideration of the jury, whether before or after the date charged, even though it may amount to proof of another offense.

ADULTERY—COMBINATION OF INCLINATION AND OPPORTUNITY.

11. When evidence of an adulterous inclination on the part of both parties to a charge of adultery has been produced, it is competent to show that opportunity existed to commit the act, and from this combination an inference of guilt will be justifiable.

ADULTERY—PROOF OF TIME ALLEGED.

12. Under Section 1309, B. & C. Comp., the exact time of the commission of an offense need not be precisely stated, as in adultery, for example, unless time is a material element in the case, and the jury may with propriety be told that proof as to time is sufficient if it shows the offense to have been committed within "a month or more" of the date charged.

REFUSING INSTRUCTIONS ALREADY GIVEN.

13. A charge specially requested may properly be refused when it has already been given elsewhere.

ERRORS NOT STATED IN BILL OF EXCEPTIONS.

14. Where errors alleged to have been committed by the court are not set out in the bill of exceptions, they are unavailing on appeal.

From Multnomah: ARTHUR L. FRAZER, Judge.

John Eggleston was convicted of adultery and appeals.
AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Geo. J. Cameron*.

For the State there was a brief over the names of *Andrew M. Crawford*, Attorney General, *John Manning*, District Attorney, *Arthur Spencer*, and *Robert G. Morrow*, with an oral argument by *Mr. Morrow*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

The defendant was tried upon an information the charging part of which is as follows:

"The said John Eggleston on the 24th day of May, A. D. 1903, in the County of Multnomah and State of Oregon, then and there being, did then and there unlawfully and feloniously commit the crime of adultery with a certain female person commonly known by the name of Florence Cline, he the said John Eggleston then and there being a married man and the husband of Alice A. Eggleston, and she, the said Florence Cline, not being his wife, contrary," etc.

Having been found guilty thereof, defendant appeals from the judgment which followed.

1. It is contended by his counsel that the court erred in overruling a demurrer to the information, interposed on the ground that it did not state facts sufficient to constitute a crime. It is argued that, the words "then and there" having been omitted after the word "and" and before the words "the husband of," etc., the information does not allege that on May 24, 1903, the defendant was the husband of Alice A. Eggleston, and hence the circumstances necessary to constitute the commission of the crime are not averred. An information, which takes the place of an indictment (B. & C. Comp. § 1259), is sufficient, so far as challenged herein, if the act charged as the crime is clearly and distinctly set forth in ordinary

and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended B. & C. Comp. § 1314. Our statute prescribing the person authorized to make a complaint in a prosecution for the crime of adultery, and who may be found guilty thereof, so far as deemed material herein, is as follows: "A prosecution for the crime of adultery shall not be commenced except upon the complaint of husband or wife. * * When the crime of adultery is committed between a married woman and an unmarried man, the man shall be deemed guilty of adultery also, and be punished accordingly": B. & C. Comp. § 1917. The information not having stated that Florence Cline was, on May 24, 1903, a married woman, a prosecution against the defendant for the crime of adultery could only be commenced by his wife, and, this being so, the necessity of alleging that he on that day had a wife living is important. An information having once stated time with certainty, may refer to it, in respect to other facts alleged, by the terms "then" and "there" without repeating it: *State v. Thurstin*, 35 Me. 205 (58 Am. Dec. 695). In that case the indictment stated that the defendant, at Avon, "on the 25th day of March, 1851, did commit the crime of adultery with one Emeline Whitehouse, the wife of one Solomon H. Whitehouse, she, the said Emeline Whitehouse, being a married woman, and the lawful wife of him, the said Solomon H. Whitehouse," and it was held to be insufficient, the court saying: "In this case the fact of committing the crime of adultery, at a certain time and place, with Emeline Whitehouse, is first alleged against the accused; but to the fact that she was a married woman, and the wife of another, no time is averred, nor is there a reference to the certain time before stated, by the words 'then' and 'there,' or any equivalent terms. Although we can readily suppose what was intended by the averments, yet

in criminal pleading nothing can be taken by intendment. The allegation 'being a married woman, and the lawful wife of Solomon H. Whitehouse,' has reference to the time of finding the indictment, and not to the time of the offense, in strictness of criminal law." In the case at bar, however, the averment, "he, the said John Eggleston, then and there being a married man, and the husband of Alice A. Eggleston," etc., does not, in our opinion, come within the rule announced in the case to which attention is called; but the clause "then and there being," in the language quoted, by the use of the word "and," which follows, applies by implication as much to the words "the husband" as it does to the phrase "a married man," and is tantamount to an averment, by reference to the time once stated with accuracy in the information, that on May 24, 1903, the defendant was the husband of Alice A. Eggleston. If the clause adverted to had been inserted in the information where defendant's counsel insists it should have been, it would have violated the rules of grammar, and constituted a repetition, disapproved by the statute: B. & C. Comp. § 1303. The omission was, therefore, of no importance: *Commonwealth v. Langley*, 14 Gray, 21; *State v. Doyle*, 15 R. I. 527 (9 Atl. 900).

2. It is contended that the court erred in admitting, over defendant's objection and exception, testimony tending to show that Florence Cline bore the reputation of being a common prostitute. Positive evidence of the commission of adultery is rarely possible, and, as crimes against morality and decency must not go unpunished, a resort must be had to circumstantial evidence, from which the overt act charged may be inferred. In prosecutions for rape, evidence of the previous unchastity of the female alleged to have been assaulted is admissible on the part of the defense as a circumstance from which consent might reasonably be inferred: *State v. Ogden*, 39 Or. 195 (65 Pac.

449). So, too, in cases of seduction; evidence of the reputation of the female for lewdness is admissible as a circumstance tending to show that the act complained of may not have been the cause of her going astray: B. & C. Comp. § 1921. In prosecutions for adultery, however, a diversity of judicial utterance is observable, but we believe that reason renders such testimony admissible, from which the overt act may be inferred. Thus in *Commonwealth v. Gray*, 129 Mass. 474 (37 Am. Rep. 378), it was held at the trial of an indictment for adultery that evidence of the reputation for unchastity of the woman with whom the defendant was alleged to have committed the act was competent. To the same effect is the case of *Blackman v. State*, 36 Ala. 295. In our opinion, no error was committed in receiving the testimony in question.

3. It is insisted by defendant's counsel that an error was committed in introducing, over defendant's objection and exception, testimony tending to show that the defendant and Florence Cline, at other places, and prior to the time specified in the information, had been guilty of the crime of adultery. In *Commonwealth v. Nichols*, 114 Mass. 285 (19 Am. Rep. 346), upon the trial of an indictment for adultery, it was held that evidence of other acts of adultery, committed by the same parties, near the time alleged, though in another county, was admissible to support the charge. In *State v. Bridgman*, 49 Vt. 202 (24 Am. Rep. 124), on the trial of an indictment for adultery, it was held that evidence of improper familiarity and adultery, both before and after the commission of the crime alleged, was admissible, the court saying: "The offense charged in this case cannot ordinarily be committed till the restraints of natural modesty and the safeguards of common deportment and conventionality have been overcome by gradual approaches, and the relations of the parties have been changed from those usually existing between the

sexes to the most intimate. * * Thus it appears that the true relation of the parties to each other in this respect is very material and proper to be shown, and there could be nothing more potent to show that no barrier of modesty or manners was remaining between the parties, and to show the real relation between them, than the fact that they were in the habit of committing the act from time to time. * * But this relation of intimacy, as before suggested, does not usually take place suddenly, and the fact of its existence at any time to that extent that intercourse was actually had would be some evidence that the relation had been existing previously, and offered with evidence of other acts so as to show the relation to be continuous through a period covering the time in question, would be quite material and convincing." The rule is well settled that on the trial of a person charged with the commission of the crime of adultery evidence of other acts of that kind, or of familiarity between the same persons, is relevant, as intending to show the adulterous disposition of the parties at the time alleged in the information: 2 Greenleaf, Evidence, § 47; 1 Jones, Evidence, § 143; Underhill, Crim. Ev. § 381; Wharton, Crim. Ev. § 35; 1 Cyc. 961; *State v. Scott*, 28 Or. 331 (42 Pac. 1); *State v. O'Donnell*, 36 Or. 222 (61 Pac. 892); *State v. Snover*, 65 N. J. L. 289 (47 Atl. 583).

4. It is maintained by defendant's counsel that no testimony was introduced at the trial tending to show that the crime was committed in Multnomah County; nor was the jury instructed that, before they could find defendant guilty, they must find that he committed the crime charged in that county. Though the bill of exceptions has attached thereto the testimony given, the court not having been requested to instruct the jury to acquit the defendant by reason of any failure of proof, it will be presumed that the testimony was sufficient in this respect.

5. It is true the jury were not told that they must find

that the crime was committed in the county alleged, but, as no request so to instruct was made by the defendant, any failure of the court in this particular is unavailing: *State v. Foot You*, 24 Or. 61 (32 Pac. 1031, 33 Pac. 537); *State v. Meldrum*, 41 Or. 380 (70 Pac. 526).

6. The court, over objection and exception, admitted in evidence alleged declarations of Florence Cline, not made in the presence of the defendant, to the effect that he was guilty of the crime charged; but thereafter the jury were instructed not to consider such evidence, and any error that may have been committed by the admission of such declarations was cured by the instructions given: *State v. Foot You*, 24 Or. 61 (32 Pac. 1031, 33 Pac. 537); *State v. McDaniel*, 39 Or. 161, 183 (65 Pac. 520).

7. The defendant, having called as his witness the district attorney of Multnomah County, was not permitted to show that such officer had filed "Not a true bill" against Florence Cline, and, an exception to the court's refusal having been reserved, it is contended that an error was thereby committed. In *Alonzo v. Texas*, 15 Tex. App. 378 (49 Am. Rep. 207), the defendant in a prosecution for adultery pleaded in bar the acquittal of his codefendant, but it was held that the plea interposed was untenable, the court saying: "While it is true that, to constitute adultery, there must be a joint physical act, it is certainly not true that there must be a joint criminal intent. The bodies must concur in the act, but the minds may not. While the criminal intent may exist in the mind of one of the parties to the physical act, there may be no such intent in the mind of the other party. One may be guilty, the other innocent, and yet the joint physical act necessary to constitute adultery may be complete. Thus, if one of the parties was, at the time of committing the physical act, insane, certainly such party has committed no crime;

but it certainly cannot be contended that the other party, who was sane, has committed no crime. So, if one of the parties was mistaken as to a matter of fact, after exercising due care to ascertain the truth in relation to such fact, which fact, had it been true, would have rendered the alleged criminal act legal and innocent, the party so acting under such mistake of fact would be innocent of crime." As the defendant, if guilty, could have been convicted of the crime charged notwithstanding the acquittal of Florence Cline, the action of the district attorney in returning "Not a true bill" as to her did not thereby discharge him, and no error was committed as alleged.

8. The court, in referring to the alleged marriage of the defendant, charged the jury as follows:

"The marriage may be proved in different ways. Evidence of eyewitnesses who saw the marriage performed is sufficient (that is, it is sufficient if you believe the evidence to be true); and if you are satisfied from the evidence in this case that at the time this act is alleged to have been committed the defendant, John Eggleston, was married to Alice Eggleston, that would be sufficient evidence upon that part of the case. I will further say that if you are satisfied that the marriage was performed, that the defendant and Alice Eggleston were married at some time prior to the time this offense is alleged to have been committed, it would not be necessary for the State to go on and show that they continued to be husband and wife, but it would be presumed they have continued to be husband and wife, in the absence of any evidence to the contrary."

An exception having been taken to this part of the charge, it is maintained that the court erred in giving it. As explanatory of the first clause of the instruction complained of, the defendant's brief contains the following statement: "It was attempted at the trial to prove the marriage of the defendant by the evidence of a daughter of Mrs. Eggleston, who testified that she was present at the marriage of defendant and her mother, in Chicago, by a justice of

the peace, but no proof was given that the justice of the peace had any jurisdiction or authority to perform the same, and we understand that the State must prove that a marriage in fact took place. The State endeavored to introduce a license and return, but the same was objected to by the defendant, and is wholly incompetent to prove that a marriage in fact was ever performed." The bill of exceptions does not contain a copy of the evidence "endeavored to be introduced," nor does it appear therefrom whether or not such evidence was received. Mr. Wharton, in his work on Criminal Evidence (9 ed.), § 173, in speaking of the proof of marriage, says: "The testimony of a witness present at the marriage is ordinarily admissible, and adequate proof, unless the law requires official evidence." In *State v. Clark*, 54 N. H. 456, on the trial of an indictment for bigamy, it was held that the testimony of persons who were present and witnessed the former marriage ceremony of the defendant was admissible to prove the fact of marriage, the court, in referring to the person who performed the ceremony, and of his authority, saying: "The evidence shows a marriage ceremony duly performed by a person who was in fact a magistrate; and it is to be presumed that the magistrate acted within the scope of his legal power and authority until evidence to the contrary appears." In *Lord v. State*, 17 Neb. 526 (23 N. W. 507), at the trial of an indictment for adultery, it was held that the marriage might be proved by an eyewitness, the court saying: "Any person who was present when the marriage took place is a competent witness to prove the marriage." It is quite probable that the license and return were received in evidence, and, this being so, the testimony of the witness who was present at the celebration of the ceremony was competent to identify the parties and to prove the marriage in fact.

9. In *People v. Stokes*, 71 Cal. 263 (12 Pac. 71), on the trial of an indictment for adultery, it was held that, after the defendant's marriage had been proved, the continuance of that relation would be presumed until a dissolution by death or divorce is affirmatively shown; the court saying: "In the absence of affirmative evidence, the dissolution of the marriage is not to be presumed to have occurred, either by divorce or by the death of one of the parties to it." It is a disputable presumption that a thing once proved to exist continues as long as is usual with things of that nature: B. & C. Comp. § 788, subd. 33. The solemnization of a marriage is based upon the mutual assent of the parties that the relation entered into shall continue until it is severed by the death of one of them. The marriage, however, is sometimes dissolved by a decree of divorce, but this method of separation is happily the exception, rather than the rule, in view of which we think the instruction complained of was proper: *Hemingway v. State*, 68 Miss. 371, 417 (8 South. 317).

10. It is contended that the court erred in giving the following instruction, to which an exception was saved, to wit:

"You can take into consideration, however, evidence tending to show an adulterous or amorous disposition on the part of the accused, and also on the part of the person with whom it is alleged he committed this crime — any adulterous or amorous disposition, or evidence tending to show an inclination on the part of these parties to commit adultery. You can take into consideration any evidence tending to show such a disposition or inclination, either before or after the time when this crime is alleged to have been committed; and you may take into consideration any evidence tending to show that this act was committed at other times and places, although it may show distinct and separate crimes, because such evidence would tend to show an adulterous disposition or inclination on the part of the parties."

This instruction was evidently founded on the rule announced in *State v. Bridgman*, 49 Vt. 202 (24 Am. Rep. 124), where it was held on the trial of an indictment for adultery that evidence was admissible of improper familiarity and adultery both before and after the commission of the offense charged, although it proved other and different offenses. What has heretofore been said in relation to the admission of testimony tending to show an adulterous disposition on the part of the defendant and of Florence Cline applies with equal force to the instruction complained of, in the giving of which no error was committed.

11. An exception was taken to the following instruction, and it is contended that an error was committed in giving it, to wit:

"You may also take into consideration any evidence tending to show an opportunity upon the part of these parties to commit this crime. Evidence of an adulterous disposition or inclination, together with evidence of an opportunity to commit the crime, would be sufficient to justify you in bringing in a verdict of guilty against this defendant, if this evidence satisfies you beyond a reasonable doubt that the crime was committed."

In *State v. Scott*, 28 Or. 331 (42 Pac. 1), it is said: "Mere proof of an opportunity to commit adultery is insufficient to convict a person of that crime, unless there be proof also of an adulterous mind on the part of both parties; and to prove this state of mind circumstantial evidence is admissible to show a purpose or inclination to commit the act." To the same effect, see *Herberger v. Herberger*, 16 Or. 327 (14 Pac. 70); *Freeman v. Freeman*, 31 Wis. 235. If adultery could be inferred from the existence of an opportunity to commit the act, it would be unsafe for persons of opposite sex to meet, except in the presence of others. When, however, proof of an adulterous disposition on the part of each party has been produced, evidence of an op-

portunity to commit the act is admissible, and from these combined factors the commission of the crime may be reasonably inferred. No error was committed in giving such instructions.

12. The court told the jury, in effect, that, though the crime was alleged to have been committed May 24, 1903, it was not necessary that they should find that was the exact date; but if they were satisfied that it was perpetrated within a month or more from the date stated, and before the information was filed, it would justify them in bringing in a verdict of guilty, if they were satisfied, beyond a reasonable doubt, that at the time the crime was committed the defendant was a married man and the husband of Alice A. Eggleston. An exception to this part of the charge having been taken, it is contended that an error was committed in giving it. The court admitted over defendant's objection and exception testimony tending to show that the defendant and Florence Cline committed adultery at a time antedating the statute of limitations, but such testimony was received as tending to show their lascivious dispositions, so that the court's limitation of a month or more from the day alleged, but prior to the filing of the information, necessarily excluded the time anterior to the statute in question, and no error was committed in giving this instruction.

13. The court refused to give the following instructions requested by the defendant, to wit:

"(1) I will instruct you that you must find that the defendant and Alice Eggleston were duly and regularly married in the State of Illinois, and such evidence must show a marriage in fact, and must be proved by witnesses, who were present at the same, that such a legal marriage was performed.

(2) I will also instruct you that you must find from the evidence adduced that the present prosecution was com-

menced by the consent of Alice A. Eggleston, the supposed wife of the defendant.

(3) You must also find beyond a reasonable doubt that up to this time, on the filing of the information, the defendant and Alice A. Eggleston were and now are husband and wife.

(4) I will instruct you also that you must find beyond a reasonable doubt that the act of adultery charged in the information was committed on the day mentioned in the information, to wit, on the 24th day of May, 1903, otherwise your verdict should be for the defendant.

(5) You are instructed that you are not to take into consideration any of the other times and opportunities that have been testified to, only in so far as showing intent of the parties.

(6) In reaching your verdict I will instruct you not to consider any of the evidence showing statements made by Florence when she was alone, and not in the presence of the defendant."

Exceptions having been taken to the action of the court in not charging the jury as requested, it is insisted by defendant's counsel that errors were thereby committed. That the marriage could have been proved by the production of the record and of the statute of the state where and in pursuance of which it was solemnized, must be admitted; and, while it might have been proved in the manner indicated in the first request, it could have been proved otherwise, and no error was committed in refusing to give the first instruction.

A part of the court's general charge to the jury is as follows:

"I should have said that you should be satisfied that this prosecution was brought at the instance of the wife before you can convict."

The jury having been properly enlightened on this branch of the case, no error was committed in refusing to give the second requested instruction.

The third request has heretofore been disposed of by invoking the presumption that a marriage once proved to have been celebrated continues during the lives of the parties.

The fourth request does not correctly state the law (B. & C. Comp. § 1309), and no error was committed in refusing to give it.

The fifth and sixth requests were given, in effect, by the court in its general charge.

14. It is insisted in the defendant's brief, and was maintained by his counsel at the trial herein, that other errors were committed by the court, but as they are not set out in the bill of exceptions, they are unavailing.

It follows that the judgment should be affirmed, and it is so ordered.

AFFIRMED.

Decided 8 August, 1904.

McFARLANE v. McFARLANE.

[77 Pac. 837]

APPLICATION TO OPEN DEFAULT — PRACTICE.

1. In considering an application to set aside a default order, especially where judgment has not been entered, and an answer disclosing a meritorious defense has been tendered, and the proceeding is apparently in good faith, the court should proceed with the idea of affording the parties a trial without unnecessary delay.

DISCRETION AS TO OPENING DEFAULT.

2. The discretion accorded the trial court by B. & C. Comp. § 103, in allowing an answer or reply to be filed after the time limited by the Code, is a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve, and not to defeat, the ends of substantial justice.

EXAMPLE OF ERROR IN DISCRETION — MISTAKE OF ATTORNEY.*

3. After the entry of a decree for divorce, procured upon service by publication, plaintiff petitioned the court for a modification of the original decree and for alimony, attorneys' fees, allowances for support of children, and costs, in pursuance of which a citation to show cause was issued to defendant. Defendant appeared specially, and challenged the jurisdiction of the court, both as to person

*NOTE.— For instances of relief against judgments entered through mistakes of attorneys see *Whercutt v. Ellis*, 5 Am. St. Rep. 164, *Barter v. Chute*, 36 Am. St. Rep. 633, and extended note to *Peterson v. Koch*, 80 Am. St. Rep. 264, 271.

and subject-matter, and, on his contentions being overruled, refused to plead further, suffered default, and appealed. On appeal he secured a reversal in part and a remand to the trial court, where he promptly made application to be permitted to answer and with the motion tendered an answer stating a good defense. *Held* that, the proceedings on defendant's part having been taken in good faith, and in order to present his opposition to the proceedings in the most advantageous manner, the court should have permitted him to answer to the merits, although he was in part mistaken in his view of the law when he suffered default and took an appeal.

From Marion : REUBEN P. BOISE, Judge.

The plaintiff, Elizabeth McFarlane, on February 24, 1899, commenced a suit against defendant for divorce, and, having procured service of summons by publication, took a decree for divorce, a third of his real property, the care and custody of the minor children, and for costs and disbursements. Subsequently, on February 5, 1903, it being ascertained that personal service could be had on the defendant, plaintiff petitioned the court for a modification of the original decree, and for alimony, attorney's fees, an allowance for the support of the minor children, and costs in the original suit, in pursuance of which a citation was issued to the defendant, requiring him to appear and show cause why the prayer of the petition should not be granted. The defendant appeared specially, and challenged the jurisdiction of the court, both as to the person and the subject-matter. The trial court, however, maintained jurisdiction, and, the defendant refusing to plead further, a default was entered against him, and a decree rendered in accordance with the prayer of the petition. The defendant appealed from such decree to this court, where he was in part successful, it being held that the plaintiff was entitled in such supplementary proceeding to a modification of the original decree in so far only as it pertained to an allowance for the support of the minor children, but that the court was without jurisdiction therein to grant alimony, attorney's fees, or costs in the original suit: *McFarlane v. McFarlane*, 43 Or. 477 (73 Pac. 203, 75 Pac. 139). Without entering a

final decree, however, the case was remanded to the trial court for such other proceedings as might be found necessary, not inconsistent with the opinion rendered. When the mandate went down, the defendant very promptly appeared, and moved the court to set aside the default, with leave to answer, basing the motion upon certain affidavits, with which an answer to the merits on the supplementary petition was tendered. This motion having been denied, and a decree rendered granting an allowance for the support of the minor children, defendant again appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Peter H. D'Arcy* and *Mr. Geo. G. Bingham*.

For respondent there was a brief over the names of *Bonham & Martin*, *Woodson T. Slater*, and *William M. Kaiser*, with an oral argument by *Mr. Carey F. Martin* and *Mr. Kaiser*.

MR. JUSTICE WOLVERTON, after stating the facts in the above terms, delivered the opinion of the court.

1. The sole question presented for our consideration is whether the circuit court erred in denying defendant's motion to open up the default, and leave to file an answer to the merits. The application comes within the first, rather than the last, clause of Section 103, B. & C. Comp., the purpose of the defendant being to be relieved of a default in failing to answer, and to be allowed to answer after the time limited by the Code, and not to be relieved of a decree entered against him through his mistake, inadvertence, surprise, or excusable neglect. The decree formerly rendered had been vacated on the appeal, and nothing remained in the record but an entry of default against the defendant, and the purpose of the motion was to get rid of this, and to be allowed to answer to the merits after the time for answering had expired. The case is not

widely different from that where simple default, not a judgment or decree, has been entered against a party who has failed to appear when served with a summons, and he applies to be let in to answer to the merits, the defendant here occupying the more pardonable position. Ordinarily, if he presents reasonable grounds excusing his default, the courts are liberal in granting relief, for the policy of the law is to afford a trial upon the merits when it can be done without doing violence to the statute and established rules of practice that have grown up promotive of the regular disposition of litigation. It was the purpose of counsel, by adopting the course pursued, to present two questions: (1) That the court had no jurisdiction of the person because of the supposed defect in the service of summons in the original cause, consequently that it could have no jurisdiction in the supplementary proceeding, such proceeding being based largely upon the hypothesis that a valid decree of divorce had been previously rendered; and (2) that the court did not have jurisdiction to grant the particular relief demanded. In doing this it is further manifest that they desired to avoid any adverse effect that a general appearance might have had, either in the original or supplementary cause, in conferring jurisdiction of the person or of the subject-matter. There was at the time of entering the special appearance a judgment of department No. 1 of the circuit court of Marion County in their favor upon the first question, although subsequently reversed (*McFarlane v. Cornelius*, 43 Or. 513, 73 Pac. 375, 74 Pac. 468), and as to the second they were successful in part upon the appeal. It is apparent, therefore, that counsel were acting in good faith, according to their best judgment, and they were not without plausible reason for resisting a general appearance. It was not an insuperable barrier to excusing their default that they were unsuccessful in maintaining their position to the

fullest extent, while, upon the other hand, the fact that they were successful in part affords persuasive and fair argument why they should be relieved. Counsel have a legal right to present their causes upon grounds of their own choosing, and to employ all fair and honorable tactics and strategy to bring them to a successful issue. By tactics and strategy we do not mean trickery or deception, or the adoption of any measures calculated to defraud or overreach the adversary, and thereby to thwart or pervert justice; but rather their privilege to call to their aid all recognized rules of law and practice most advantageous to the maintenance of their course. That they may at times mistake the law, the rules of practice, or the application of either, is not to the purpose, for, if counsel were always right, and always agreed upon such matters, there would be but little use for courts of justice, except as triers of fact. When, however, they have acted conscientiously, and in perfect good faith, in the course pursued toward the court and the opposing parties litigant, and have reasonable grounds upon which to base their judgment, it does not stand to reason that they or their clients should be punished or suffer because it subsequently develops by judgment of the court that they were mistaken in their views of the law and the proper procedure to be adopted.

2. Now, without pursuing the matter further, it is insisted that, because counsel were mistaken as a matter of law, the court ought not to relieve defendant of his default. Every time, however, a demurrer is filed and overruled, there is an apparent mistake on the part of counsel as a matter of law; yet, if interposed in good faith, courts do not hesitate to grant leave to answer. Indeed, such is the law's behest (B. & C. Comp. § 101), and the statute under which the present relief is sought is strongly akin to that. The delay here was necessarily larger than in

such a case, but that circumstance does not detract from the force of the argument, as the course pursued was apparently the only safe method at the command of counsel by which to save all the questions desired to be presented for adjudication. The defendant has a meritorious defense, and we are called upon to determine whether there was an abuse of discretion in the trial court in denying his motion. The discretion accorded is one governed and controlled by legal principles—"a legal discretion," as was said in *Thompson v. Connell*, 31 Or. 231, 235 (48 Pac. 467, 65 Am. St. Rep. 818), "to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to defeat, the ends of substantial justice."

3. Taking into account the viewpoint of counsel, acting honestly and from conscientious motives, as it is very apparent they did, that the course pursued was the only way by which questions deemed vital to their defense could be most effectively presented, and their right to have the law finally determined upon the theory adopted, it not being trivial or frivolous, and there being plausible reason and authority for its support, we are of the opinion that the motion ought to have been granted, and that there was error in the exercise of the legal discretion accorded to the court in such matters in denying it. In support of these views and the conclusions here reached, see *Baxter v. Chute*, 50 Minn. 154 (52 N. W. 379, 36 Am. St. Rep. 633); *Whereatt v. Ellis*, 70 Wis. 207, 35 N. W. 314, 5 Am. St. Rep. 164).

The decree of the trial court will therefore be reversed, and the cause remanded, with directions to allow the motion to set aside the default of defendant in the supplementary proceeding, with leave to file his answer tendered to the merits, and for such other proceedings as may seem proper.

REVERSED.

Argued 28 June, decided 1 August, rehearing denied 5 November, 1904.

STATE v. BRIGGS.

[77 Pac. 750, 78 Pac. 361.]

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER.*

1. A legislature cannot delegate the power of making laws, or invest any person or board with an arbitrary discretion, but it can delegate the right to adopt suitable regulations or requirements connected with the enforcement of an act, such as the right to determine the qualifications of applicants for licenses to practice trades or professions requiring particular knowledge or skill.

An act such as Laws 1903, p. 27, prohibiting every unlicensed person from practicing the barber's trade or conducting a school of barbering, and providing for the appointment of a state barber board with power to prescribe the qualifications of barbers, is not unconstitutional as conferring arbitrary power on the board, in that the act does not prescribe the standard of knowledge or qualification required of prospective barbers.

DUTY OF BOARD OF BARBER EXAMINERS.

2. Laws 1903, p. 31, § 9, authorizing the board of barber examiners to prescribe the qualifications of barbers within the State, does not confer on the board arbitrary power to issue or refuse licenses at its pleasure, but the board is impliedly required to exercise the power conferred by prescribing fair and reasonable qualifications appropriate to the calling intended to be regulated, operating generally and impartially upon all applicants similarly situated.

QUESTION PRESENTED BY RECORD.

3. Where defendant was tried and convicted of a violation of Laws 1903, p. 27 § 1, making it unlawful for one not a registered barber to conduct a barber school without the permission of the board of barber examiners, and a motion in arrest of judgment was sustained on the theory that the law was unconstitutional, only the question of the validity of the law, and not the conduct of the board of examiners under it, was presented for consideration on appeal.

APPEAL—PRESUMPTION OF REGULARITY.

4. In a case involving the legality of a law creating a board with power to adopt rules, it will be presumed on appeal, in the absence of a showing in the record that the board acted within its powers.

STATUTES—TITLE OF ACT.

5. The matter of licensing barber schools is so far germane to and connected with the title of an act entitled "An act to regulate the pursuit, business, art, and avocation of a barber, the licensing of persons to carry on such business, and to insure the better qualification of persons following such business," as to be valid: Const. Or. Art. IV, § 20.

From Multnomah: MELVIN C. GEORGE, Judge.

The State appeals from an order arresting judgment after a conviction of H. L. Briggs for conducting a barber

*NOTE.—On the subject of Delegation of Legislative Power see notes in 11 L. R. A. 582; 31 L. R. A. 112; 39 L. R. A. 285 (briefs); and 80 Am. St. Rep. 212-224, where there is a note on Powers Which may be Delegated to Boards of Health.

school without a license. The ground of the decision of the trial court was that the act establishing a board of barber examiners is unconstitutional. REVERSED.

For the State there was a brief* over the names of *John Manning*, District Attorney, *Arthur Spencer*, *John H. McNary*, *John F. Logan*, and *Robert Galloway*, with an oral argument by *Mr. McNary*.

For respondent there was a brief and an oral argument by *Mr. Frank S. Grant* to this effect.

I. The barber act of 1903 is unconstitutional in that the legislature has not therein fixed the qualifications of a barber, but has delegated to a board the power to determine them, a thing that cannot be done under our system of government. The legislature can only delegate the power to determine some fact or thing upon which a statute makes or intends to make its own action depend: *Brown v. Fleischer*, 4 Or. 132; *State v. Gaunt*, 13 Or. 115 (9 Pac. 55); *Ex parte Cox*, 63 Cal. 21; *Schaezlein v. Cabaniss*, 135 Cal. 466 (87 Am. St. Rep. 122, 56 L. R. A. 733, 67 Pac. 577); *Boyd v. Bryant*, 35 Ark. 69 (37 Am. Rep. 6); *Dent v. United States* (Ariz.), 71 Pac. 920; *State v. Copeland*, 3 R. I. 33; *Fogg v. Union Bank*, 60 Tenn. 435; *Seneca Bank v. Lamb*, 26 Barb. 595; *Maxwell v. State*, 40 Md. 273; *Anderson v. Manchester Assur. Co.* 59 Minn. 182 (28 L. R. A. 609, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241); *Dowling v. Lancashire Ins. Co.* 92 Wis. 93 (65 N. W. 738); *Owensboro & N. R. Co. v. Todd*, 91 Ky. 175 (11 L. R. A. 285, 36 Am. St. Rep. 586, 11 S. W. 56); 22 Am. & Eng. Enc. Law (2 ed.), 920.

II. The legislature alone has the power to prescribe what qualifications are requisite to follow the business of barbering in this State, and that power cannot be dele-

* A synopsis of this brief is not given because it is substantially followed in the opinion of the court.—REPORTER.

gated: *State v. Randolph*, 23 Or. 74 (37 Am. St. Rep. 655, 17 L. R. A. 470, 31 Pac. 201); *State v. Creditor*, 44 Kan. 565 (21 Am. St. Rep. 306, 24 Pac. 346); *Ex parte McNulty*, 77 Cal. 165 (11 Am. St. Rep. 257, 19 Pac. 237); *Fox v. Territory*, 2 Wash. Ter. 297 (5 Pac. 603); *State v. Carey*, 4 Wash. 424 (30 Pac. 729); *Eastman v. State*, 109 Ind. 278 (58 Am. Rep. 400); *Orr v. Meek*, 11 Ind. 40 (111 N. E. 787); *State v. Green*, 112 Ind. 462 (14 N. E. 52); *Wilkins v. State*, 113 Ind. 514 (16 N. E. 192); *Langenberg v. Decker*, 131 Ind. 471 (16 L. R. A. 108, 31 N. E. 190); *Driscoll v. Commonwealth*, 93 Ky. 393 (20 S. W. 31); *State v. Fleischer*, 41 Minn. 69 (42 N. W. 696); *State v. Heinemann*, 80 Wis. 253 (27 Am. St. Rep. 34, 49 N. W. 818); *State v. Currens*, 111 Wis. 431 (56 L. R. A. 252, 87 N. W. 561); *State v. Knowles*, 90 Md. 646 (49 L. R. A. 695, 45 Atl. 877); *Gage v. Censors of N. H. Soc.* 63 N. H. 92 (56 Am. Rep. 492); *Dent v. West Virginia*, 129 U. S. 114 (9 Sup. Ct. 231); 22 Am. & Eng. Enc. Law (2 ed.), 738.

III. The act in question is purely an arbitrary attempt to vest an irresponsible discretion in a board composed of three barbers, from whose pleasure there is no appeal. It is such an unreasonable and arbitrary vesting of power that it should not be upheld by any court: *Noel v. People*, 187 Ill. 587 (79 Am. St. Rep. 238, 52 L. R. A. 287, 58 N. E. 616); *Yick Wo v. Hopkins*, 118 U. S. 356 (6 Sup. Ct. 1064); *Schaezlein v. Cabaniss*, 135 Cal. 466 (56 L. R. A. 733, 87 Am. St. Rep. 122, 67 Pac. 577.)

MR. JUSTICE BEAN delivered the opinion of the court.

The defendant was convicted for conducting a barber school in violation of an act of the legislature of 1903 (Laws 1903, p. 27), amendatory of the act of 1899 (Laws 1899, p. 237; B. & C. Comp. §§ 3841–3853), regulating the trade or calling of a barber, and providing for the licensing of persons carrying on such trade. Judgment

was arrested upon motion, however, the trial court holding the act in question unconstitutional and void on the ground that it delegates to the board of barber examiners legislative authority, and vests in them power to issue and withhold licenses arbitrarily and at pleasure. If the law is open to either objection, the judgment must be affirmed. It is a settled maxim that the power conferred upon a legislature to make laws cannot be delegated by that department to another body or authority (Cooley, Const. Lim., 7 ed., 163), and any statute attempting to vest in a board, officer, or tribunal arbitrary power to issue or withhold permission or license to practice any trade, profession, or calling without regard to discretion, in the legal sense of that term, or without regard to the qualifications of the applicant, is void: *White v. Holman*, 44 Or. 180 (74 Pac. 933); *Yick Wo v. Hopkins*, 118 U. S. 356 (6 Sup. Ct. 1064); *Noel v. People*, 187 Ill. 587 (58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238). Without setting out the provisions of the law challenged in detail, it is sufficient for the purposes of the question here involved that it defines what shall constitute the occupation of a barber (Laws 1903, p. 31, § 9); provides for the appointment of a board of examiners; defines the powers and duties of the board, among which is "to make such by-laws as it may deem necessary not inconsistent with the constitution of this State, or with the provisions of this act, and shall prescribe the qualifications of a barber in this State" (p. 27, § 2); declares that it shall be unlawful for any person not registered to practice the business of a barber, or conduct a barber shop or barber school, without the sanction of the board (pp. 27, 32, §§ 1, 12); and provides a penalty for the violation of its provisions: p. 31, § 10. While the law defines what shall constitute a barber, it does not prescribe the standard or degree of knowledge, learning, ex-

perience, or qualification which shall be required before applicants shall be licensed or authorized to practice or follow the trade or calling, but leaves that matter to be determined by the board of examiners. This, it is argued, renders the act void, because it is a delegation of legislative authority, and vests in the board arbitrary and unregulated powers. The position of the defendant is that, while the legislature may lawfully regulate the trade or calling of a barber, and require all persons following it to register, or obtain certificates from the board of examiners, it must provide in the act the standard of qualification required, leaving to the board the mere duty of ascertaining whether the applicant possesses such qualification.

1. Legislative power cannot be delegated, and the legislature cannot confer upon any person, officer, or tribunal the right to determine what the law shall be. This is a function which the legislature alone is authorized under the constitution to exercise. The constitutional inhibition, however, cannot be extended so as to prevent the legislature from conferring authority upon an administrative board to adopt suitable rules, by-laws, regulations, and requirements to aid in the successful carrying out and execution of a law it has passed. The doctrine on this subject is admirably stated by Mr. Justice AGNEW, in *Locke's Appeal*, 72 Pa. 491 (13 Am. Rep. 716), as follows: "Then the true distinction, I conceive, is this: The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of

the halls of legislation." It is well settled by a long line of authorities in harmony with this doctrine that the power given to an administrative board like the one now under consideration to prescribe rules and regulations reasonably adapted to carry out the purposes and object for which the board is created does not constitute an improper delegation of legislative authority. See *Blue v. Beach*, 155 Ind. 121, 133 (56 N. E. 89, 50 L. R. A. 64, 80 Am. St. Rep. 195), and cases there cited. Thus, the legislature of South Carolina passed an act giving the board of agriculture power to grant or refuse licenses to mine for phosphate rock in the property of the State, as the board might in its discretion deem best. The act was held valid, and not a delegation of legislative authority, the court saying: "It is undoubtedly true that legislative power cannot be delegated, but it is not always easy to say what is and what is not legislative power, in the sense of the principle. The legislature is only in session for a short period of each year, and during the recess cannot attend to what might be called the business affairs of the state. From the necessity of the case, as well as the character of the business itself, that must be performed by agents appointed for that purpose—such as the railroad commission, regents of the lunatic asylum, the state board of canvassers of elections, sinking fund commission, etc. The numerous authorities cited in the argument show conclusively that, while it is necessary that the law itself should be full and complete, as it comes from the proper lawmaking body, it may be—indeed, must be—left to agents in one form or another to perform acts of executive administration which are in no sense legislative": *Port Royal Min. Co. v. Hagood*, 30 S. C. 519 (9 S. E. 686, 3 L. R. A. 841).

The pure food law of Indiana provided that within ninety days after its passage the board of health should adopt

measures to facilitate the law's enforcement, and prepare rules regulating minimum standards of food, defining specific adulterations, etc. It was held not an attempted delegation of legislative power. Mr. Justice HADLEY said: "The obvious purpose of the provision last quoted was to commit to a body of learned and scientific experts the duty of preparing such rules and prescribing such tests as may from time to time, in the enforcement of the law, be found necessary in determining what combination of substances are injurious to health, and to what extent, if at all, admixtures or deteriorations of foods and drugs may go without injuriously affecting the health of the consumer. That which is required of the State Board of Health has no semblance to legislation. It merely relates to a procedure in the law's execution for a reliable and uniform ascertainment of the subjects upon which the law is intended to operate": *Isenhour v. State*, 157 Ind. 517 (62 N. E. 40, 87 Am. St. Rep. 228). A law of Georgia vested in a railroad commission authority to make reasonable and just rates for freight and passenger traffic, to be observed by all railroads doing business in the state, and the act was held valid, the court saying: "It was not expected that the legislature should do more than pass laws to accomplish the ends in view. When this was done, its duty had been discharged. All laws are carried into execution by means of officers appointed for that purpose; some with more, others with less, but all must be clothed with power sufficient for the effectual execution of the law to be enforced. Legislative grants of power to the officers of the law to make rules and regulations which are to have the force and effect of laws are by no means uncommon in the history of our legislation": *Georgia Railroad v. Smith*, 70 Ga. 694. An act of Congress authorizing the Secretary of War to make such rules and regulations as might be necessary to prevent obstructions in the Mississippi River provided that any viola-

tion of such rules and regulations should constitute a misdemeanor, and it was held that the act was not invalid because conferring legislative authority on the secretary, as he was only authorized to make rules, and it was the act itself which declared a violation to be a crime: *United States v. Breen*, (C. C.) 40 Fed. 402. The legislature may properly delegate to a board the power to determine what is a college in good standing or a reputable college, within the meaning of a law authorizing graduates of such a college to practice their profession: *Barmore v. State Board of Medical Examiners*, 21 Or. 301 (28 Pac. 8); *People ex rel. v. Dental Examiners*, 110 Ill. 180.

These authorities are directly to the purpose that in the regulation and licensing of trades, occupations, callings, and professions which affect the public welfare the legislature must enact the law necessary to accomplish the object in view; but it may be carried into execution by some officer or board appointed for that purpose, and such officer or board may be authorized to prescribe the qualifications of those desiring to follow such callings or professions. There are other cases holding laws of this character valid, although the point in issue here is not directly discussed in them. Thus, in West Virginia, every practitioner of medicine was required to obtain a certificate from the State Board of Health that he was a graduate of a reputable medical college, or that he had practiced medicine in the State continuously for ten years prior to the passage of the act, or that he had been found, upon examination by the medical board, qualified to practice medicine in all its branches. There was no provision in the statute as to the standard of qualification which the board should exact or enforce in its examination of applicants, that being left entirely to its judgment; and yet the law was held valid by both the supreme court of the State and of the United States: *West Virginia v. Dent*, 25 W. Va. 1;

Dent v. West Virginia, 129 U. S. 114 (9 Sup. Ct. 231). In the latter case Mr. Justice FIELD said: "No one has a right to practice medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications." The legislature of Alabama passed an act making it unlawful for an engineer of any railroad train to draw or operate an engine upon the main line or roadbed of any railroad without first undergoing an examination and obtaining a license from the board of examiners for locomotive engineers. The Supreme Court of the United States held the law valid, although it did not provide what should constitute the qualification of an engineer, but left that matter to the judgment of the board: *Smith v. Alabama*, 124 U. S. 465 (8 Sup. Ct. 564). A law of the State of New York providing for the examination and licensing of plumbers was held valid and constitutional, although it did not attempt to define the qualification which should be required of licensed plumbers, but vested that power in the board of examiners: *People ex rel. v. Warden*, 144 N. Y. 529 (39 N. E. 686, 27 L. R. A. 718). Similar statutes were upheld in Maryland (*Singer v. State*, 72 Md. 464, 19 Atl. 1044, 8 L. R. A. 551), and in Ohio: *State v. Gardner*, 58 Ohio St. 599 (51 N. E. 136, 41 L. R. A. 689, 65 Am. St. Rep. 785). Other cases to the same effect could be referred to, but these are sufficient to show that the provision of the act under consideration, vesting authority in the board of examiners to prescribe the qualifications of a barber, is not a delegation of legislative power.

It is sometimes said in opinions and in law books that, where a statute undertakes to regulate the licensing of call-

ings, trades, or professions, the extent of the qualifications required of the licensee must be determined by the judgment of the legislature; but this does not mean that the legislature must necessarily provide in the act itself the exact qualifications required. It may delegate that power to a board or commission created and authorized by it, which, in the exercise of the authority vested in it, acts on behalf of the State; its conclusions and judgments, so long as exercised within the limits of the law, being the acts of the State, and binding as such. The nature and character of the profession, trade, or calling intended to be licensed or regulated often demands technical knowledge and learning in order to designate accurately the qualifications which should be possessed by those designing to follow it. In the nature of things, this is a matter outside the ordinary scope of legislative wisdom. The prescribing of the proper qualifications of applicants for licenses by some agent of the State, learned in such profession or calling, is not legislation, but rather the exercise of a mere administrative power. A law, when it comes from the legislature, must be complete, but there are many matters affecting its execution and relating to methods of procedure, which the legislature may properly delegate to some ministerial board or officer, and prescribing the qualifications of persons who shall be licensed to follow or engage in the practice of a given trade or profession is one of them.

2. Now, is the law in question open to the objection that it confers upon the board of barber examiners power to prescribe varying standards of qualifications for different applicants, or arbitrarily to grant or refuse a license at will? The authority to prescribe the qualifications of a barber is a general grant of power, and does not, like the laws held void in *Noel v. People*, 187 Ill. 587 (58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238), and *Yick Wo v. Hopkins*, 118 U. S. 356 (6 Sup. Ct. 1064), vest in the board

the absolute discretion to grant or withhold licenses. The board is required to exercise the power conferred by prescribing fair and reasonable qualifications appropriate to the calling intended to be regulated, operating generally and impartially upon all in like situations; and there is no pretense that it has not done so. If it should act arbitrarily or oppressively, its conduct might call for a remedy against the members of the board, but it would not furnish a ground for declaring the act invalid: *People v. Hasbrouck*, 11 Utah, 291, 306 (39 Pac. 918); *People ex rel. v. Warden*, 144 N. Y. 529 (39 N. E. 686, 27 L. R. A. 718); *People ex rel. v. Dental Examiners*, 110 Ill. 180. The constitutionality of a law is to be determined by its provisions, and not by the manner in which it may be administered; and, unless it conflicts with the constitution, the law is valid. The law here in question provides for the appointment of a board, made up of persons skilled in the calling, to which the duties imposed are intrusted for performance, and to which is committed the power of prescribing such qualifications for applicants applying for licenses desiring to practice the trade or calling of a barber as may be just and reasonable, and it must be presumed that the board will exercise fairly and impartially the powers conferred.

It follows that the judgment of the court below must be reversed, and it is so ordered. REVERSED.

Decided 5 November, 1904.

ON MOTION FOR REHEARING.

PER CURIAM. By a petition for rehearing several points are raised and discussed which were not presented at the original hearing and are not mentioned in the briefs of either party. We have, however, examined the questions made, but deem them without sufficient merit to justify a rehearing. The section of the statute (Laws 1903, p. 27, § 1) making it unlawful for any person who is not a duly

registered barber to conduct a barber school without the sanction of the board of barber examiners does not, as we interpret it, vest in the board absolute power to grant or withhold such permission at its pleasure. The section is a part of the general act regulating the pursuit, business, or calling of a barber, and must be construed in connection with the entire act. There is no purpose indicated anywhere in the law to vest the board with absolute power in any respect. It is not given authority to issue or withhold permission to conduct a barber school at its discretion, nor does the statute confer upon it a naked absolute power in that particular. The power granted is to be exercised in a reasonable and just manner, having due regard to the qualifications and fitness of the applicant.

3. The point that the board must adopt proper rules and regulations, defining generally the qualifications of a barber, and the requirements which will be exacted of a licensee or of an applicant for permission to conduct a barber school, and, in the absence of such regulations first promulgated, it exercises arbitrary powers in granting or withholding a license or permission to conduct a school, is not presented by the record. The defendant was tried and convicted. A motion in arrest of judgment was afterward sustained on the theory that the law was unconstitutional. The validity of the law, therefore, and not the conduct of the board under it, is the only question presented on the appeal.

4. There is no bill of exceptions, and the record does not disclose whether the board had or had not promulgated suitable rules and regulations, and until the contrary appears the court will assume that it has properly discharged its duties in that regard, whatever they may be.

5. The matter of the licensing of a barber school is so far germane to and connected with the title of the act as to be valid.

REVERSED; REHEARING DENIED.

Decided 8 August, rehearing denied 17 October, 1904.

KRAUSE v. OREGON STEEL CO.

[77 Pac. 883.]

OBSTRUCTION OF WATER COURSE — IRREPARABLE INJURY.

1. Obstruction of a river, materially impeding the flow of its waters, and consequently the drainage from low lands along and near its course, materially retarding the planting of crops thereon, is an irreparable injury, authorizing equitable relief.

OBSTRUCTING WATER COURSE — QUANTUM OF PROOF.

2. In a suit to enjoin the obstruction of a river, whereby the drainage of adjoining lands is retarded, the plaintiff has the burden of proof only to the extent of establishing his case by a preponderance of the evidence.

INJUNCTION — EQUITY — LACHES.

3. Defendant in a suit to enjoin obstructing a river with a dam impeding the drainage of lands, may not urge the objection of laches because the suit was not brought at an earlier date, it being in no worse position for maintaining its defense, and having been involved in no expense or inconvenience on account of the delay, and the injurious effects of the dam having been complained of from the time of its obstruction, and a concession of a partial abatement thereof having been obtained through the insistence, the suit being brought three years later.

From Clackamas: THOMAS A. McBRIDE, Judge.

Suit for an injunction by August Krause against the Oregon Iron & Steel Company, resulting in a decree as prayed for, from which defendant appeals. **AFFIRMED.**

For appellant there was a brief over the names of *Geo. C. Brownell*, *Algernon S. Dresser*, and *Williams, Wood & Linthicum*, with an oral argument by *Mr. Stewart B. Linthicum* and *Mr. J. Couch Flanders*.

For respondent there was a brief over the names of *Cicero M. Idleman* and *Lionel R. Webster*, with an oral argument by *Mr. Idleman*.

MR. JUSTICE WOLVERTON delivered the opinion.

The defendant constructed a dam in the Tualitin River, in Clackamas County, in 1888, which it maintained in its original condition until 1894, when, on account of the complaints of landowners, farmers, and gardeners upon the lowlands along the river above, it was lowered and otherwise materially abated, and has been since preserved

in that state to the time of the institution of this suit, November 6, 1897. This general statement is subject to the qualification that certain flashboards were employed temporarily from time to time as convenience suggested for the purpose of raising it in either condition to a still greater height. The plaintiff is the owner of a tract of twenty-five acres of land near the river, which he alleges is drained by it and Rock Creek, a small tributary thereto; and that by reason of the obstruction caused by the dam the water is cast upon his land, and the drainage so impeded and retarded as to hinder and delay him in planting his crops until too late in the season for them to mature properly, to his irreparable damage. The Tualitin River, in its general character, is a tortuous and sluggish stream, extending many miles inland from its confluence with the Willamette. Much of the land along its course is of a swampy and marshy character, soft and spongy, and has been redeemed by drainage. Being so redeemed, it is very valuable for gardening and farming purposes. The land owned by plaintiff is of this character, it being formerly submerged by a swamp. Rock Creek is situated twelve or fifteen miles above the dam by the way the water runs, and plaintiff's land lies nearly a mile above its mouth, but near its course, and is drained by means of ditches and drains emptying into it. It has been quite definitely established, and in fact is scarcely controverted, that prior to the erection of the dam in 1888 plaintiff was not hindered in the planting of his crops in the spring by reason of the water remaining on his land, but that the drainage was ample to carry it away in regular course after the spring rains had subsided. The dam was originally built to enable the defendant to float cord wood through a canal constructed from the river some three or three and one half miles above to Sucker Lake, thence to defendant's plant, which had the effect of backing the water up in the main stream

a long distance above. The exact extent to which it retarded the flow therein and cast the water back upon the lands along its course is difficult to determine, but that it was seriously impeded in the usual and natural discharge there can be no possible doubt. It is in evidence that when the dam was completed in 1888, which was in the latter part of the summer, the water at Scholl's Ferry, twenty-five miles above, was raised twenty-five inches, and at the mouth of Rock Creek from three to three and one half feet. This we accept as reliable, for there is nothing of moment to contradict it, and the river was rendered navigable for small steamboats and other light craft.

From the best proofs we have in the record, it appears that the dam was first constructed at a height of five feet above the bed of the stream, for a distance of 100 feet, and upon either end of this space it was raised by steps to a height still above that, approximating six feet at the margin of the stream; the entire length being about 250 feet. The main span was built of sawed timbers, twelve by twelve inches, five of these being placed one above the other, with perhaps a decking over all. Above this the company also used a couple of flashboards, which together were twenty inches in width, with which to raise the dam when it was desired, and when both were in use they increased its height to six feet eight inches, or more. It is a conceded fact that the use of the dam in this mode and condition was very detrimental to the farmers and gardeners on the stream above, because in 1894, after a conference was had with a number of them so affected, the defendant agreed to and did lower it for a space of 200 feet, so that it stood two feet lower than the 100-foot space as originally constructed; but it was still stepped up at the margins of the stream at either end of the 200-foot space. This was done by taking two tiers of timbers off of the 100-foot space and lowering the additional 100 feet to its level.

How the wings were reconstructed does not appear. This left the dam still consisting of three tiers of these timbers, placed one above the other, and upon this was a four-inch decking, so that it was approximately three feet four inches in height at its lowest space. The defendant, however, continued the use of the flashboards of the same width as before, when convenient, and permitted others to use them. These statements we make in the nature of conclusions of fact, deeming them so clearly established that it would be a work of supererogation to attempt to summarize and comment upon the testimony adduced tending for or against their support. We may simply allude to the following named witnesses testifying with relation thereto: Charles Porter, E. A. Eddy, John L. Smith, E. Savage, August Krause, F. Groner, Fred Fredericks, A. J. Hess, and William Jergens.

From a survey made of Rock Creek for drainage purposes prior to the building of the dam, it was ascertained to have a fall of from three to three and one half feet from a certain road mentioned in the evidence down to the mouth of the stream, where it empties into the Tualitin River. Plaintiff's place is seventy or eighty rods above the road. At the crossing of the creek there is a bridge, nearly a mile from the river. From this data we are enabled to get some idea of the influence of the dam upon the drainage of plaintiff's premises. We have seen from the evidence that the dam as originally constructed raised the Tualitin at the mouth of Rock Creek from three to three and one half feet, which was sufficient to set the water back up the creek a considerable distance, if not to the road; several witnesses indicating that it was cast back a mile, or nearly to the bridge, and that a foot more would have carried it upon the plaintiff's premises; one affirming that it checked the fall entirely; and it needs no demonstration to prove that it would materially stifle and prevent the requisite drain-

age so necessary to the successful cultivation of his land. The dam was subsequently lowered two feet, however. This would leave some rise in Rock Creek — from a foot to a foot and a half above the normal condition. There appear to have been a series of riffles, five in number, originally in the main stream, the lowest being some four miles above the dam and the highest above the town of Tualitin. The condition was such that John L. Smith, a witness for defendant, could not run his scow, drawing fourteen inches, over one of them, but, in order to accomplish his purpose, he obtained permission of defendant to put the flashboards upon the dam, and on doing so he secured the required depth. This was in the summer of 1897. Measurements were taken at the time twenty or thirty rods below the mouth of Rock Creek to ascertain what effect the flashboards had on the stream at that point, and it was found that when the water stood nineteen inches on the flashboards it was raised nine inches at the point designated, thus showing the direct effect of raising the dam on the stream above at Rock Creek.. One of the witnesses, in answer to a question whether they put in those flashboards whenever they chose, pointedly states his objection as follows: "Yes, sir; whenever they feel like it. That is the reason I want that dam out. I don't want any flashboards on that dam."

1. Witnesses for the plaintiff, however, generally concur in their testimony that the dam in its present condition and as maintained and controlled impedes very materially the flow of the water in the Tualitin, and consequently the drainage from the low and previously overflowed lands along and near its course, and retards the planting of crops thereon from one to three and four weeks in the spring, to the manifest injury of the owners year by year; some years greater, and at others less. Such an injury is irreparable, because insusceptible of definite ascertainment

and exact redress, and affords proper cause for equitable interference through the injunctive process. There is testimony contradictory of this, but we are unable to accord it to equal weight, so that the preponderance of the evidence is clearly in favor of the conditions thus indicated. It stands to reason that a sluggish stream affords a tardy drainage at best, and that the difficulty is heightened in direct proportion as the stream is obstructed and the current clogged and checked, and we have no doubt that the dam as at present constructed and maintained, considering as well the use of the flashboards, interferes appreciably with the plaintiff in planting and producing his crops. At what particular height it can be maintained without injuring him is not so clear. Relatively speaking, a two-foot dam would affect Rock Creek but slightly, and we entirely agree with the judgment of the learned trial court that it ought to be abated to that height from the lowermost portion of the bed of the stream, and be so maintained continuously. The decree should therefore be affirmed.

It should be stated that many individuals are affected similarly to the plaintiff, and that, although not parties to this suit, they have contributed to its prosecution for the purpose of obtaining an abatement of any obstruction of Tualitin River by the defendant resulting to their detriment.

2. Defendant's counsel contend that, to be successful, plaintiff should make out his case by clear and convincing proof, and that otherwise the court ought not to interfere with defendant's maintenance of its dam. The rule sought to be invoked, however, is not applicable here. The defendant owes to the plaintiff and other landowners whose crops are dependent upon the proper drainage of the soil in which they are produced a duty to see that it does not trespass upon their prior acquired rights and

privileges, and it can proceed with its obstructions of the stream just so far only as not to impinge upon these rights and privileges. The case sought to be maintained is a continuing trespass, and there exists no reason here whatever why a stronger rule should be applied against plaintiff than the usual one—that the party making the better case by the preponderance of the testimony is entitled to prevail.

3. It is urged also that the plaintiff has been guilty of laches in not instituting his suit sooner, and ought not to succeed on that account. It appears, however, that the dam has been a disturbing factor with these people along the Tualitin River ever since it was first constructed, and they have not since ceased to complain of its injurious effects. Such was their insistence in 1894 that they obtained a concession of a partial abatement of the obstruction. But this proved to be inadequate, and within a little over three years later this suit was begun. The defendant has been involved in no expense or inconvenience on account of the delay in instituting the suit, and is clearly in no worse position for maintaining its defense now than if the suit had been brought at an earlier date. The position is therefore untenable.

The form of the decree is unobjectionable. The words “beginning from the lowermost portion thereof” should be construed as meaning from the lowermost portion of the bed of stream; not from the lowest depth of some hole or sudden depression therein, but from the lowermost part of the general contour of the channel. The twelve-inch timbers presumably rest on the bed, and they should not be constructed to a height greater than two feet from the lowest part of the general contour.

AFFIRMED.

Argued 10 August, decided 15 August, 1904.

DURHAM v. COMMERCIAL NAT. BANK.

[77 Pac. 902.]

SURPRISE — JUDGMENT CONTRARY TO STIPULATION.

1. A judgment rendered against a party in pursuance of but contrary to a stipulation is a proceeding taken against him by surprise within the meaning of Section 108, B. & C. Comp., authorizing the court to relieve a party from such a judgment.

TROVER — INTEREST AS DAMAGES.

2. The measure of damages in an action of trover is the value of the property at the time of the conversion, with interest from such date, the interest being considered an item of damages.

TROVER — EFFECT OF STIPULATION.

3. In an action for conversion, being one of a series of similar cases, plaintiff's right to interest from the date of the conversion is not affected by a stipulation that the case in question shall await the outcome of a test case of the series whereupon judgment shall be entered accordingly, the effect of such agreement not being to fix the time when interest shall begin, but only the fact of conversion.

From Multnomah: JOHN B. CLELAND, Judge.

Action by Ella C. Durham, administratrix of S. A. Durham, deceased, against the Commercial National Bank of Portland. In 1899 Henry Weinhard, George H. Williams, and others, including the plaintiff, commenced separate actions at law against the defendant bank to recover damages for an alleged conversion by it of shares of its capital stock. After the issues had been joined in the several actions, a stipulation was entered into between the parties by which it was agreed that the case of Weinhard and Williams should be tried before the court without the intervention of a jury, and in the remainder of the cases no further action should be taken until a final decision of the court of last resort, which it was agreed should be the Supreme Court of the United States, in the Weinhard Case, and that "on such final decision by said Supreme Court of the United States, or judgment herein in accordance therewith in said cause of *Henry Weinhard v. Commercial National Bank of Portland*, judgment shall be rendered in

each of said causes covered by this branch of this stipulation in accordance with the legal import and effect of the decision in said Weinhard Case, wherein the issues are identical with said cases, except as to the number of shares of the capital stock of the defendant involved; but, in the event that such decision or judgment in said Weinhard Case shall be for said plaintiff, said judgments shall, as to this particular, follow the allegations of the respective complaints as to the number of shares." In pursuance of this stipulation the Weinhard Case was tried, and on December 6, 1900, the court made and filed its findings of fact and conclusions of law, in which it found (1) that on May 5, 1897, Weinhard was the owner and holder of 100 shares of the capital stock of the defendant, of the par value of \$100 per share; (2) that on said date the defendant wrongfully and unlawfully converted the same to its own use and benefit, and the actual value at such time was \$30 per share, or \$3,000: and as a conclusion of law that Weinhard was entitled to judgment against the bank for \$3,000, and his costs and disbursements. Judgment was entered accordingly, and on appeal it was affirmed by this court in May, 1902 (*Weinhard v. Commercial Nat. Bank*, 41 Or. 359, 68 Pac. 806), and by the Supreme Court of the United States in January, 1904: *Commercial Nat. Bank v. Weinhard*, 192 U. S. 243 (24 Sup. Ct. 253).

Thereafter, and on February 26, 1904, the plaintiff in the present case moved for judgment in her favor, in accordance with the stipulation referred to, for \$2,190, the value of the shares converted by the bank and belonging to her, with interest thereon from December 7, 1900, the date of the filing of the findings of fact and conclusions of law in the Weinhard Case. The court, without notice to the defendant or its counsel, and without the knowledge of either, rendered judgment accordingly. In April following, and at a subsequent term of the court, the defend-

ant moved to vacate or modify the judgment because not in accordance with the pleadings and stipulation of the parties. The motion was allowed, and the judgment modified so that it is for the value of the stock converted, and interest thereon from the 26th of February, 1904, the day the judgment was rendered, instead of from the time the findings in the Weinhard Case were filed. From this judgment the plaintiff appeals. REVERSED.

For appellant there was a brief and an oral argument by *Mr. Thomas O'Day*.

For respondent there was a brief over the name of *Platt & Platt*, with an oral argument by *Mr. Robert T. Platt*.

MR. JUSTICE BEAN, after stating the facts in the above terms, delivered the opinion of the court.

1. It is insisted that the court had no power at a subsequent term to vacate or modify the judgment rendered in February. The statute provides that the court may, "in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect": B. & C. Comp. § 103. A judgment rendered against a party contrary to an understanding or agreement with his adversary is taken against him by "surprise," within the meaning of this section: *Thompson v. Connell*, 31 Or. 231 (48 Pac. 467, 65 Am. St. Rep. 818). The judgment in this case was rendered in pursuance of a stipulation of the parties, and, if contrary thereto, was within the principle announced, and defendant may obtain relief therefrom under section 103.

2. The remaining question is whether the plaintiff is entitled to include in her judgment, as an item of damages, interest on the value of the stock belonging to her, and wrongfully and unlawfully converted by the defend-

ant, from the date of the filing of the findings of fact and conclusions of law in the Weinhard Case. The contention for the defendant is that this question must be determined alone from the terms of the stipulation, and, unless it expressly provides for interest on the value of the stock converted prior to the rendition of the judgment, none can be allowed; but we do not consider the provisions of the stipulation in this regard as material. The action is in trover for conversion of the stock. It is clear and is admitted that, under the stipulation, the judgment in the Weinhard Case determined the liability of the defendant, the fact of conversion, the value of each share of stock converted, and that such stipulation, together with the complaint in the present action, shows the plaintiff to have been the owner of 73 shares of stock so converted. Her stock was therefore of the value of \$30 a share, or \$2,190, at the time of its conversion; and the rule of law is in an action of this kind that the measure of damages is the value of the articles at the time of their conversion, with interest thereon from that date: *Eldridge v. Hoefer*, 45 Or. 239 (77 Pac. 874); 4 Sutherland, Damages (3 ed.), § 1109; 2 Sedgwick, Damages (8 ed.), § 493; Field, Damages, § 792.

3. Although, therefore, the stipulation did not expressly provide for interest on the value of the stock converted, the plaintiff was entitled thereto as a matter of law, as an item of damages caused by the conversion. The stipulation and the decision in the Weinhard Case settled plaintiff's right to a judgment against the defendant for the unlawful conversion by it on May 5, 1897, of 73 shares of stock, of the then value of \$30 per share, and the law fixes the amount of the recovery at the value of such shares and interest. It is true, interest is not recoverable as such on an unliquidated claim until the amount thereof is ascertained: *Pengra v. Wheeler*, 24 Or. 532 (34 Pac. 354, 21

L. R. A. 726). But in an action of trover it is alleged on the value of the article converted, not as interest, but as an item of damages, and the owner of the property may recover it as a part of the damages suffered by him. Under the law, therefore, the plaintiff would have been entitled to interest, if she had demanded it, on the value of the stock from the time it was converted by the defendant to the date of the judgment in her favor, but interest was not claimed prior to the date of the findings in the Weinhard Case. Judgment was, on motion of plaintiff, rendered accordingly, and by that judgment she is bound.

The order of the court made in April, 1904, modifying the judgment previously rendered, will be reversed, and the cause remanded, with directions to overrule defendant's motion to vacate such judgment. **REVERSED.**

Decided 17 October, 1904.

STATE v. WOOLRIDGE.

[78 Pac. 833.]

PERJURY — INFORMATION — CHARGING AUTHORITY TO ADMINISTER OATH.

1. Under B. & C. Comp. § 1321, providing that in an information for perjury it is sufficient to set forth in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, an information stating that the person before whom the statements in question were made was "empowered and authorized by law to take depositions and evidence, and to administer oaths to witnesses in said county, and particularly to do said things and to so act with reference to said W. in said cause," sufficiently states that the clerk had authority to administer oaths in the proceeding in which the perjury is assigned.

INFORMATION FOR PERJURY — CHARGING ADMINISTERING OF THE OATH.

2. A statement in an information for perjury that defendant appeared before the clerk of the court to have her deposition taken in a certain cause, and was then and there duly sworn in the said cause, sufficiently alleges that an oath was administered to the defendant.

PERJURY — CHARGING MATERIALITY OF TESTIMONY.

3. In an information for perjury charged to have been committed by denying on oath in a deposition certain statements attributed to her in a newspaper article, a charge that defendant, being sworn, did, in a matter material to a civil cause growing out of the publication of her alleged statements, falsely and corruptly swear, sufficiently shows the materiality of her evidence.

ORAL PROOF OF PERJURY IN UNWRITTEN DEPOSITION.

4. Although the statutes require that a deposition shall be in writing and signed by the party giving it, oral testimony as to the statements made by deponent is admissible where the deposition was not reduced to writing, or, if written, was not signed, the perjury being in the false statements and not in the writing of them.

PERJURY — PAROL PROOF OF CONTENTS OF STENOGRAPHIC DEPOSITION.

5. On a prosecution for perjury in giving a deposition, parol evidence is admissible to show the testimony given, although it was taken by a stenographer, and the extended notes are not shown to have been lost or destroyed.

WAIVING IRREGULARITIES IN TAKING DEPOSITIONS.

6. Notwithstanding B. & C. Comp. § 826, authorizing the taking of depositions in certain instances, a deposition may be lawfully taken without any proof of the existence of the facts required by statute, if both parties are present, and raise no question as to the regularity of the proceeding, so that a person may be guilty of perjury in making a deposition under such circumstances.

From Multnomah: JOHN B. CLELAND, Judge:

Frankie Woolridge appeals from a conviction of perjury.

AFFIRMED.

For appellant there was a brief and oral argument by *Mr. Berryman M. Smith* to this effect.

I. The indictment does not show that the county clerk had any authority to administer the oath to defendant in said proceeding of Roberts against the publishing company. The authority to swear a witness during a trial is a very different thing from authority to administer an oath in proceeding to take a deposition out of court, and in the latter case his authority must be stated. The following cases are in point on principle: *State v. Spencer*, 6 Or. 152; *State v. Ah Lee*, 18 Or. 540 (23 Pac. 424); *State v. Shupe*, 16 Iowa, 36 (85 Am. Dec. 485, 496); *United States v. Curtis*, 107 U. S. 671; *United States v. Perdue*, 4 Fed. 897; *United States v. Howard*, 37 Fed. 666; *United States v. Manion*, 44 Fed. 800; *United States v. Redgood*, 49 Fed. 54; *United States v. Garcelon*, 82 Fed. 611.

II. In a special proceeding where the authority to administer the oath depends upon the existence of certain facts, these must be proved: *McGregor v. State*, 1 Ind. 232; *People v. Howard*, 111 Cal. 655 (44 Pac. 342).

III. It must be alleged and proved that the testimony alleged to be false was material to a stated issue in the case. The statement here is only by way of recital, whereas it should be direct: *State v. Witham*, 6 Or. 366; *Collins v. State*, 78 Ala. 433; *People v. McCormick*, 8 Cal. 289, 291; *People v. Jones*, 123 Cal. 299, 302; *Commonwealth v. Knight*, 12 Mass. 273 (7 Am. Dec. 72); *People v. Fox*, 25 Mich. 492, 496; *State v. Faulknor*, 175 Mo. 546, 616; *Gandy v. State*, 23 Neb. 436, 448; *State v. Kalyton*, 29 Or. 375, 379; *United States v. Shin*, 14 Fed. 447, 453; Bishop, Crim. Law (2 ed.), §§ 1030, 1031.

IV. The statement deposed to is not an oath until it is read to and subscribed by the witness: B. & C. Comp. §§ 826, 836, 837, 838, and 840.

V. Contradictory statements are not substantive evidence to prove any fact in issue, but can be used only to affect the credibility of the witness: *State v. Buckley*, 18 Or. 228 (22 Pac. 838); *Langford v. Jones*, 18 Or. 307 (22 Pac. 1064).

VI. The statutory provisions as to the taking of depositions must be strictly followed: 1 Rice, Evidence, 694; 6 Am. & Eng. Enc. Law, 582, note 4; *Wilson v. Campbell*, 33 Ala. 249, 254 (70 Am. Dec. 586); *Elgin v. Hill*, 27 Cal. 373; *Eddleman v. Gilmore*, 75 Ill. 357, 369; *Looker v. Looker*, 46 Mich. 68, 69; *Patterson v. Wabash, St. Louis, etc. R. Co.* 54 Mich. 91, 100; *Duncan v. Mutual Ins. Co.* 50 N. Y. 332.

For the State there was a brief over the name of *Andrew M. Crawford*, Attorney General, *John Manning*, District Attorney, and *Gustavus C. Moser*, with an oral argument by *Mr. Moser*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

The defendant, Frankie Woolridge, was convicted of the crime of perjury, and appeals from the judgment which followed.

1. Her counsel contends that the information on which she was tried does not state facts sufficient to constitute a crime. The information charges that on October 29, 1903, one John Roberts commenced an action in the Circuit Court of the State of Oregon for Multnomah County against the Oregonian Publishing Company, a corporation, to recover the sum of \$10,000 as damages for an injury to his reputation, claimed to have been sustained by reason of the publication in the *Evening Telegram*, a newspaper printed at Portland and circulated in Oregon, of an alleged malicious defamation of himself, consisting of certain remarks concerning him, attributed to the defendant herein, the entire complaint being set out in the information.

This then follows:

"That thereafter, and on the 5th day of November, 1903, the defendant, Frankie Woolridge, appeared before one F. S. Fields, who was then and there duly appointed, qualified, and acting county clerk of Multnomah County, Oregon, and *ex officio* clerk of the Circuit Court of the State of Oregon for Multnomah County, and duly empowered and authorized by law to take depositions, testimony, and evidence in said county, and to administer oaths to witnesses in said county, and particularly to do said things and to so act with reference to said defendant, Frankie Woolridge, in said cause hereinbefore mentioned, to give evidence and testimony as a witness in said cause, and to have her deposition taken by said F. S. Fields, clerk of the said court and county, as aforesaid, to be used upon the trial of said cause; and that then and there and on said date of November 5, 1903, in said Multnomah County and State of Oregon, then and there being, said Frankie Woolridge appeared before said F. S. Fields, clerk of said court and county, as aforesaid, and was then and there duly sworn by said officer of said court and county to testify the truth, the whole truth, and nothing but the truth in said cause then and there pending in the Circuit Court of the State of Oregon for Multnomah County wherein said John Roberts was plaintiff and said Oregonian Publishing Company, a corporation, was defendant."

Then follows a charge that the defendant herein, in a matter material to the action hereinbefore mentioned, falsely, wilfully, feloniously, and corruptly deposed, declared, and swore, setting out her alleged statements under oath, and averring wherein they were false, and that she well knew that the testimony so declared, given, and deposed by her as being true was then and there false, contrary, etc.

It is argued by defendant's counsel that, the information having stated that Fields, the county clerk, was "authorized by law to take depositions, testimony, and evidence in said county, and to administer oaths to witnesses in said county, and particularly to do said things and to so act with reference to said defendant, Frankie Woolridge, in said cause hereinbefore mentioned," is an averment that he was empowered to administer oaths in the Circuit Court of the State of Oregon for the County of Multnomah, of which he was *ex officio* clerk, and not an allegation of his authority to administer an oath in the proceeding in which the perjury is assigned. "The oath," says a text-writer, discussing the crime of perjury, "must be taken before a person having competent authority to administer it; otherwise the false statement would be no offense": 3 Archbold, Crim. Pr. & Pl. (Waterman's Notes), 594. An indictment for perjury must allege that the officer administering the oath was authorized to do so: *People v. Dunlap*, 113 Cal. 72 (45 Pac. 183), and if it fails in this respect it is fatally defective: *State v. Owen*, 73 Mo. 440. The statute prescribing the mode of alleging the facts constituting the crime of which the defendant was convicted is as follows: "In an indictment for perjury or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, and in what court, or before whom, the oath alleged to be false was taken, and that the court or person

before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter upon which the perjury is assigned; but the indictment need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury is committed": B. & C. Comp. § 1321. The form of an indictment for perjury recommended by the legislative assembly of this State is as follows:

"On his examination as witness, duly sworn to testify the truth, in the trial of an action at law in the court of — between C. D., plaintiff, and E. F., defendant, which court had authority to administer said oath, he testified falsely, that (stating the facts alleged to be false), the matters so testified being material, and the testimony being wilfully false: 1 B. & C. Comp., Form No. 18, p. 752.

In *State v. Ah Lee*, 18 Or. 540 (23 Pac. 424), on the trial of a defendant for perjury, it was held that an indictment which contains every allegation mentioned in the form given in the appendix to the Criminal Code for such crime was sufficient. The forms thus prescribed have been held sufficient in other cases: *State v. Dodson*, 4 Or. 64; *State v. Brown*, 7 Or. 186; *State v. Wintzingerode*, 9 Or. 153; *State v. Lee Yan Yan*, 10 Or. 365. In *State v. Spencer*, 6 Or. 152, in an indictment for perjury alleged to have been committed by the defendant as a witness in a civil action tried in the circuit court of this State, it was held that the averment that the false oath was taken in such court, without designating the officer by whom it was administered was sufficient. Mr. Chief Justice PRIM, speaking for the court, in distinguishing the mode of alleging the necessary facts in other cases, said: "But if the oath in which perjury was assigned had been administered by the clerk in some outside matter then it would have been necessary to allege that it was taken before the clerk." To the same effect is the case

of *State v. Ah Lee*, 18 Or. 540 (23 Pac. 424), which was also an indictment for perjury. In *McGregor v. State*, 1 Smith, (Ind.) 179, it was held that an indictment for perjury founded on an oath taken before the clerk of a circuit court of Indiana should show that the oath was one which the clerk was authorized to administer. In the case at bar the information having alleged the facts hereinbefore stated respecting Fields' authority to administer an oath to the defendant and to take her deposition sufficiently states that he was empowered by law to do so.

2. It is insisted that the information does not state that an oath was in fact administered to the defendant in the proceeding before the clerk. The transaction in the presence of Fields was the taking of her deposition to be used in the action mentioned, and, in our opinion, the averment that "Frankie Woolridge appeared before said F. S. Fields, clerk of said court and county, as aforesaid, and was then and there duly sworn by said officer in said court to testify the truth, the whole truth, and nothing but the truth in said cause then and there pending in the Circuit Court of the State of Oregon for Multnomah County wherein the said John Roberts was plaintiff and said Oregonian Publishing Company, a corporation, was defendant," sufficiently states that an oath was administered to her by Fields.

3. It is maintained that the information does not allege that the testimony given by the defendant was material to any issue in the cause in which the deposition was taken. The statute regulating the mode of securing written declarations under oath is as follows: "The testimony of a witness in this State may be taken by deposition, in an action at law, at any time after the service of summons, or the appearance of the defendant; and in a special proceeding after a question of fact has arisen therein, in the following cases: * * (2) When the witness's resi-

dence is such that he is not obliged to attend in obedience to a subpoena, as provided in section 807; (3) when the witness is about to leave the county and go more than twenty miles beyond the place of trial; (4) when the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend": B. & C. Comp. § 826 The information stating "that said Frankie Woolridge, then and there being in said Multnomah County, and being then and there so sworn, as aforesaid, in a matter material to said cause, did falsely, wilfully, feloniously, and corruptly depose, declare, and swear," etc., is a sufficient averment of the materiality of her testimony, for, if she had admitted the statements imputed to her, as published in the newspaper, her testimony would necessarily have tended to mitigate the damages sought to be recovered; but if she denied, as the information alleges, that she made such remarks concerning the plaintiff in that action, her deposition would have tended to aggravate the measure of the recovery; so that in either case her testimony, by reason of the provisions of the statute quoted, was material, though no issue was joined by the filing of an answer: 2 Roscoe, Crim. Ev. (8 ed.), *849; *State v. Norris*, 9 N. H. 96.

4. It is contended by defendant's counsel that the court erred in permitting Fields as a witness for the State to answer the following question: "State to this jury what, if anything, the defendant, Frankie Woolridge, at the time she was sworn by you, as aforesaid, as a witness, on the 5th day of November, 1903, in the cause of John Roberts against the Oregonian Publishing Company, said as to whether or not she had a conversation with W. F. Kieran, Sally White, Reporter Hill, or Patrolman Goltz, or either of them, at or about the hour of half past ten o'clock or eleven o'clock on October 8, 1903, at the police station in the City of Portland, with reference to her having been out carousing and drinking with Special Officer Jack Rob-

erts from early Monday morning until late in the afternoon." An objection was interposed thereto on the ground that, if Fields was commissioned to take her deposition, it must have been in writing, and subscribed by her, and, if completed in this manner, her declaration under oath was the best evidence of the testimony given, and hence secondary evidence thereof was inadmissible, unless it was first made to appear that the deposition was lost, or could not be secured. The bill of exceptions, in noting the ruling of the court on this objection, contains the following statement: "It thereupon appearing to the court that said testimony given by said Frankie Woolridge before said Fields had never been extended from the stenographer's notes, and had not been signed by the said Frankie Woolridge, nor returned to the clerk of the circuit court, the objection was overruled, and an exception allowed." It is argued that the defendant's testimony should have been reduced to writing; that the oath was not complete until this was done, and the written declaration read over to or by her, affording her an opportunity to make any corrections therein, and to subscribe her name thereto; that the subscription is an essential part of the description of the offense, without which perjury cannot be assigned; and that parol evidence was not admissible to prove the contents of what should have been in writing. A deposition is a written declaration under oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross-examine: B. & C. Comp. § 816. The deposition shall be written by the officer taking the same, or by the witness, or by some disinterested person, in the presence and under the direction of such officer. When completed, it shall be read to or by the witness, and subscribed by him. Before subscribing it, the witness shall be allowed, if he desire it, to correct or explain any statement in the deposition; but such statement, al-

though corrected and explained, shall remain a part of the deposition : B. & C. Comp. § 836. The officer taking the deposition shall append thereto his certificate, to the effect that the deposition was taken before him, at a place mentioned, between certain hours of a day or days mentioned, and reduced to writing by a person therein named ; that before proceeding to the examination, the witness was duly sworn to tell the truth, the whole truth, and nothing but the truth ; that the deposition was read to or by the witness, and then by him subscribed : B. & C. Comp. § 837. The officer taking the deposition shall inclose the same in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action, suit, or proceeding is pending : B. & C. Comp. § 838. These excerpts from the statute show the mode prescribed for taking and certifying depositions ; but, the regulations not having been fully observed, was parol evidence admissible to prove the statements made by the defendant under oath when she appeared before the county clerk of Multnomah County to have her deposition taken.

The crime of perjury, if perpetrated, was fully consummated when the defendant gave the alleged false testimony : 22 Am. & Eng. Enc. Law (2 ed.), 682 ; 2 Roscoe, Crim. Ev. (8 ed.), *842. Perjury may be committed in the giving of a deposition, which, by reason of some informality, would have prevented its reception in evidence if it had been offered at the trial : *State v. Whittemore*, 50 N. H. 245 (9 Am. Rep. 196.) Thus, as was said by the court in *State v. Langley*, 34 N. H. 529 : "To constitute perjury it is necessary that the false testimony be in relation to matters material to the issue ; but it is not material to the perjury that the testimony is in such form, or comes from such sources or through such channels, that it is competent to be used at the hearing for which it was taken."

The distinction between an affidavit and a deposition is that the latter is taken with, and the former without, notice to the adverse party, each being a written declaration under oath: B. & C. Comp. §§ 815, 816. In *Commonwealth v. Carel*, 105 Mass. 582, the defendant, having been indicted for perjury, alleged to have been committed in making a written statement of his property for the purpose of becoming surety on a bail bond, in which he falsely swore to certain material matters, but the written accusation not having averred that he signed such statement, it was held that the signature was unnecessary; the court saying: "It is not averred that the defendant signed his name to the paper, but the signature is no part of the statement. Its only object is to authenticate it as his declaration. If he made oath to it, he authenticated it effectually, and the want of signature would be immaterial." In *People v. Curtis*, 50 Cal. 95, on an indictment for perjury alleged to have been committed by the defendant while giving evidence on the examination before a committing magistrate of a person charged with a crime, it was held that the prosecution might, on the trial, prove by parol evidence what the accused swore to before the magistrate, though the statute of California required the testimony of each witness on such examinations to be reduced to writing as a deposition, which was to be read over to and signed by him, but, if he refused to subscribe his name to the written declaration, his reasons therefor were to be stated in writing, which was to be signed and certified by the magistrate.

In *Covey v. State*, 23 Tex. App. 388 (5 S. W. 283), it was ruled that, though the testimony taken at an examining trial should have been reduced to writing, as required by the law of Texas, yet perjury might be assigned upon oral testimony taken, but not reduced to writing, in such trial. In *Commonwealth v. Hatfield*, 107 Mass. 227, in dis-

cussing a similar question, Mr. Justice COLT, speaking for the court, says: "It can make no difference that either before or after the oath was administered the statements made were reduced to writing and signed by the defendant. The offense consists in the false statement of material facts under oath knowing them to be false, without reference to the mode of statement, whether oral or written." Mr. Weeks, in his work on Depositions (section 561), contending that the written declaration under oath affords the best evidence of what the witness said, nevertheless admits that, if his testimony was not reduced to writing, as the law required, parol evidence of what he deposed is admissible; saying: "But if the written examination of a prisoner is excluded from informality other than for having been taken on oath—in which case, under the English law, confession is inadmissible, as not having been voluntarily made—or if it be clearly proved that the statement was not reduced into writing, parol evidence is admissible to show what was said by the prisoner; for such evidence is offered, not in substitution of the official document, since no such document in that case exists, but as the best evidence which the circumstances admit of being produced." We believe that reason and authority show that, notwithstanding the statute requires a deposition to be reduced to writing and subscribed by the deponent, a failure to comply therewith did not render the action of the court in admitting parol evidence of the defendant's testimony erroneous, for, as was said by the court in *Commonwealth v. O'Neill*, 5 Pa. Co. Ct. R. 209, in commenting on a failure of an officer to observe certain statutory regulations respecting the mode of evidencing testimony and of the consequences resulting from the crime of perjury, alleged to have been committed by the defendant in taking a false oath as to his qualifications to vote at an election: "Whilst it may be true that these

requirements may have been neglected by the parties, and the election officers may have disregarded their duties, it certainly cannot relieve the defendant, who was duly sworn before a competent tribunal as to a matter which was material to the issue, namely, his right to vote."

5. It is maintained that, the defendant's testimony having been taken down by a stenographer, his notes thereof afford the best evidence of what she said, and, as it was incumbent on the State to introduce the highest proof it could produce, the court erred in permitting the county clerk to detail the testimony she gave before him. It has been held that the notes of a stenographer taken at a former trial may be read on a subsequent examination of the same cause, or in a different suit or action; but such notes when transcribed, do not exclude the testimony of an intelligent bystander, who has heard and paid particular attention to the testimony of the witness: 26 Am. & Eng. Enc. Law (2 ed.), 781; *Brice v. Miller*, 35 S. C. 537 (15 S. E. 272); *Taylor v. Preston*, 79 Pa. 436. No error was committed in permitting Fields to testify as to what the defendant said under oath before him.

6. A request to instruct the jury to return a verdict of not guilty having been denied, and an exception saved, it is contended that an error was thereby committed. It is argued that because the bill of exceptions discloses that no affidavit or other paper was filed in the case of Roberts against the Oregonian Publishing Company showing the necessity for taking the defendant's deposition, the right to secure which was special, depending upon the existence of certain facts (B. & C. Comp. § 826), the clerk had no authority to take her testimony, and hence she was not guilty of the crime with which she was charged. The bill of exceptions states that when the defendant appeared before the county clerk the attorneys for the respective par-

ties to the action mentioned were in attendance, "and without questioning the regularity of the proceedings" the defendant was sworn, etc. The rule is well settled that irregularities occurring in the manner of giving notice to take depositions or in the mode of taking them may be waived by appearing without objection and giving testimony: *State v. Lavalley*, 9 Mo. 834; *Mumma v. McKee*, 10 Iowa, 107; *George v. Nichols*, 32 Me. 179. The attorneys for the respective parties having voluntarily appeared and permitted the defendant to testify before the county clerk, no error was committed in refusing to instruct the jury as requested.

Other alleged errors are assigned, but deeming them, in view of what has already been said, unimportant, the judgment is affirmed.

AFFIRMED.

Argued 10 April, decided 17 October, 1904.

BERGER v. MULTNOMAH COUNTY.

[78 Pac. 224.]

EFFECT OF TAX-SALE PURCHASE BY COUNTY—SUBSEQUENT SALE.

1. Under the scheme of assessment and taxation existing in Oregon prior to 1901, by which only such interest in lands was assessed as the taxpayer had in the realty at the time of listing, and under Laws 1893, p. 28, authorizing counties, on sales of land for taxes, to bid the amount of taxes and costs, and declaring that, if no better bid was made, the land should be sold to and become the property of the county, subject to redemption as provided by law, the counties acquired a lien on the lands thus sold which was not affected by subsequent sales to other purchasers under later assessments. Later sales do not cut off rights acquired under prior sales.

TITLE CONVEYED BY TAX DEED UNDER SECTION 3127, B. & C. COMP.

2. A tax-sale purchaser receiving a tax deed under Section 3127, B. & C. Comp. which provides that tax deeds shall vest in the purchaser all the rights of the former owner, owners, lienholders, claimants, or other persons interested in the land, and also the rights and claims of the State and county, does not thereby, acquire the lien theretofore obtained by the county under purchases at tax sales, because the assessment made after the tax-sale purchases by the county was on such interest only as the owner had, and the legislature could not declare that the deed should convey a greater interest than was involved in the tax proceeding. Such a declaration would result in depriving property owners of the fee of their land without any process of law whatever.

From Multnomah: JOHN B. CLELAND, Judge.

45 402
46 532
46 538

Statement by MR. JUSTICE WOLVERTON.

The plaintiff, Henry Berger, claiming title to certain real property under tax deeds bearing date December 24, 1902, executed in pursuance of sales for delinquent taxes assessed and levied for the year 1899, seeks by this proceeding to restrain Multnomah County from selling or otherwise disposing of the property involved, and to remove as a cloud upon plaintiff's title all claim of any interest therein by the county arising by virtue of its having previous to plaintiff's purchases bid in the property upon sales for taxes theretofore assessed against the same. The sales under which plaintiff claims title took place on December 12, 1900, for the taxes of 1899, and those under which the defendant county claims an interest as follows: May 5, 1899, for taxes assessed for the year 1891; May 9, 1899, for taxes for 1892; May 11, 1899, for taxes for 1893; May 12, 1899, for taxes for 1894; May 13, 1899, for taxes for 1895; August 30, 1899, for taxes for 1897; December 12, 1899, for taxes for 1898. Beyond this, the property was reported by the sheriff as unsold for the taxes assessed for the year 1896. As a ground for the relief sought it is alleged that the county and the sheriff thereof are threatening and are about to sell and dispose of said real property for the taxes assessed for the several years last named. The decree of the trial court was favorable to plaintiff, and defendants appeal. REVERSED.

For appellant there was a brief over the names of *John Manning*, District Attorney, and *Arthur C. Spencer*, with an oral argument by *Mr. Spencer*.

For respondent there was a brief over the names of *Gantenbein & Veazie* and *Geo. W. Caldwell*, with an oral argument by *Mr. Arthur L. Veazie*.

MR. JUSTICE WOLVERTON delivered the opinion.

1. The most vital question involved by the appeal is

whether the county, by the sheriff's sales under which the plaintiff claims title, and the deeds issued in pursuance thereof, no redemption having been had in the mean while, is precluded from disposing of the property with a view to realizing taxes assessed in previous years for the nonpayment of which it was sold to the county. Counsel for plaintiff strenuously affirm that it is. Upon the other hand, it is contended that the sales and deeds to plaintiff, if regular, were effective to convey only such interest as the delinquent taxpayers had at the time they were assessed, and that such interest was subject to the burden of the prior taxes designated, and therefore that the plaintiff purchased subject to the claim of the county for all such unpaid taxes. It has been recently determined by this court that under the scheme of assessment and taxation existing in this State prior to 1901, such interest only was assessed as the taxpayer had in the realty at the time of listing—that is, such as is known in the books as the “derivative title”—and not the land primarily, as the summation of all interests of whatsoever nature pertaining thereto, and that a sale for delinquent taxes thereunder, and the deed following in due course, did not cast a fee simple absolute, or new and independent title, divested of all previous incumbrances or limitations, but operated to convey the delinquent's title only, carrying to the purchaser all his interest or estate therein, subject to the burdens and incumbrances previously contracted and suffered by the rightful owner: *Middleton v. Moore*, 43 Or. 357 (73 Pac. 16). The reasons that impelled the holding are so fully set forth in our decision of that case that it is unnecessary to elaborate upon them further at the present time. The case has since been followed in *Ferguson v. Kaboth*, 43 Or. 414 (72 Pac. 200, 74 Pac. 466). In 1893, the legislature empowered the county judge of each county in the State to bid for and in behalf of the county upon legal

sale of land for taxes the amount of the taxes and costs that may have been charged against such land, or each parcel thereof, and provided that, if there was no higher or better bidder, such land should be "sold to and become the property of the county, * * subject to redemption as provided by law": Laws 1893, p. 28. It was under this enactment that the county bid in and purchased the property here involved. This act was amended in 1901, whereby it was provided that redemption might be made from any such sales thereafter or theretofore made to counties on the terms and within the time provided by law at the time of the sale for redemption of lands sold for taxes to private purchasers, and, if no redemption should be made, title to the land so sold should vest in the county, without issuance of deed or other formality: Laws 1901, p. 71. By other sections of the amendatory act it was further provided that the lands theretofore bid in by the counties might be redeemed at any time before July 1, 1901, on payment of the taxes and all costs charged on the rolls against the lands, without other penalty, but that the sheriffs of the several counties in the State should on said date sell all lands not so redeemed to which the title had been acquired in the manner designated, and that thereupon as soon as practicable he should execute a deed to the purchaser, which should have the effect to vest in him the fee simple thereto.

It is not very clear what was the intendment of the act of 1893 as to conveying the title of the delinquent to the county *ipso facto* upon the expiration of the time for redemption without the necessity of the deed from the sheriff, but it is manifest from the subsequent act that the legislature did not consider that such was its force and effect, because it seemed to think it necessary to declare in positive terms that the title, in case no redemption was had in accordance with the law in force at the time of

sale, should vest in the county without the issuance of a deed or other formality. Besides it treated the lands theretofore sold to the counties as still redeemable by extending the time to a day certain for their redemption. These later expressions carry the impress that it was the purpose of the legislature to place its own interpretation upon the prior act, and to put its true and final meaning beyond cavil, and define and settle intervening rights accruing by virtue thereof. The assessors of Multnomah County must have so understood it, for it appears that they have invariably assessed the property to the individual whose property had been sold for taxes, even though the time for redemption on the sales had in the earlier instances expired. If the tax sales had become absolute at the expiration of the time for redemption, then the property could not have been further assessed at all, it being the property of the county; but the assessing officers did not so treat it. Neither did the county, as it made no attempt to dispose of it, or otherwise claim it as owner, until the legislature by the later act authorized the sheriff to sell the same after the delinquents were accorded further time for redemption. The sheriff is now further authorized, under section 6 of the later act, to offer for sale on the first Monday in July of each year, in like manner as he was required to offer lands theretofore unredeemed on the first day of July, 1901, all lands to which the county shall have acquired title during the preceding year by virtue of purchase at tax sales, upon which the period of redemption has expired. Thus we find that the purchase by the counties prior to the act of 1901 was intended as a step in the process of collection of taxes, and that the counties did not thereby acquire the title after the time for redemption had expired, but, as the legislature has itself subsequently elucidated and defined, held the lands notwithstanding subject to redemption by the taxpayer. It follows, there-

fore, if subject to redemption, that all such lands were properly assessable to the owner until his title had been divested under and by virtue of the provisions of the act of 1901. The titles to none of the lands in question were so divested.

Now, what was the effect of the sales to plaintiff under a subsequent assessment and deeds acquired by virtue thereof upon the prior sales to the county? Did they cut off or eradicate all interest of the county acquired by its purchases, or operate to preclude it in any way from asserting the rights theretofore acquired? We are impressed that they did neither. By bidding in the property at the sheriff's sales the county acquired a lien thereon, whatever might have been the status as to the tax being a lien upon the land prior to its sale. The effect of the provisions of the statute then subsisting was to create a lien in favor of the county from the day of its purchases. This has been determined in *Jory v. Palace Dry Goods Co.* 30 Or. 196, 203 (46 Pac. 786). Such being the case, plaintiff's legal position is this: He purchased the delinquents' derivative titles—that is, such titles as they had in the property—subject to the liens of the county for the prior taxes, which in no way operates to estop the county from enforcing such liens. Such is the logical, and we may say the inevitable, result of the doctrine of *Middleton v. Moore*, 43 Or. 357 (73 Pac. 16), which is clearly applicable here. The county was not authorized, by virtue of its purchases, or the liens thereby acquired, to redeem from the tax sales under which plaintiff claims title; nor could it prevent the sales by the sheriff to plaintiff, that being a duty enjoined upon that officer, and beyond the control of the county; so that, unless the liens were effective for the county's recoupment, it must lose the prior taxes altogether. But the sales to plaintiff were subject to these liens, which does justice to the county, and works no in-

justice to the individual. In further support of this conclusion, see *People ex rel. v. City of Buffalo*, 68 N. Y. Supp. 409, 71 N. Y. Supp. 1145 (63 App. Div. 563). This case is instructive, and of strong analogy to the one at bar. See, also, *Dennison v. City of Keokuk*, 45 Iowa, 266. Where no such lien has been created by a sale and purchase, it would also seem logically to follow that a tax title acquired under a later assessment would stand divested of any incumbrance by virtue of the subsistence of a prior tax, and that upon the ground that the tax itself, without else, was not made by the statute a lien upon the property.

Of the cases relied upon by plaintiff's counsel to establish an estoppel against the county, those from Pennsylvania proceed upon the principle that the sale creates a new and independent title in fee, paramount to any existing estate, and that the county commissioners, having acquired such an estate by purchase at a tax sale, would, by subsequently permitting the land to be assessed and sold for taxes accruing, be estopped from claiming title as against subsequent purchasers—a consequence that would seem naturally to follow from the very ground plan of the scheme of assessment: *Hunter v. Albright*, 5 Watts & S. 423; *Diamond Coal Co. v. Fisher*, 19 Pa. 267; *Schreiber v. Moynihan*, 197 Pa. 578 (47 Atl. 851); *Feltz v. Natalie Coal Co.* 203 Pa. 166 (52 Atl. 82). So the case of *Murphy v. Packer*, 152 U. S. 398 (14 Sup. Ct. 636), and other cases cited, are based upon like principle, except *Clyburn v. McLaughlin*, 106 Mo. 521 (17 S. W. 692, 27 Am. St. Rep. 369), which rests upon the principle that the owner received the surplus for which the land sold above the tax having knowledge of all the attending conditions at the time, and *Law v. People*, 116 Ill. 244 (4 N. E. 845), which holds that by not including all the taxes due in a judgment the State abandons such as were omitted. None of these cases has

application here under the scheme of assessment existing prior to 1901.

2. Another question made is that under Section 3127, B. & C. Comp., a deed made in pursuance of a sale for taxes prior to its adoption vests in the purchaser all the right, title, interest, and claim of the state and county, as well as of the former owner or owners, lienholders, claimants, etc., and that by reason thereof the county has been deprived of all its prior acquired interest in the premises involved. It is doubtful if such was the intendment of the legislature in the adoption of section 3127, in view of the act of 1901, heretofore discussed, passed at the same session, authorizing the counties to dispose of land theretofore purchased at tax sales on July 1, 1901. But, whatever may be the true interpretation of the section as to that, it is plain that the legislature could not authorize the sheriff or tax collector to convey by deed a larger estate than such as was sold at the tax sale. Such a law would operate to take from the county a vested interest, and confer it upon the plaintiff, who never acquired any right thereto, but purchased, considering the statute then in vogue, expressly subject to such interest, and would therefore be without constitutional warrant. The principle has the sanction of this court in *Ferguson v. Kaboth*, 43 Or. 414 (73 Pac. 200, 74 Pac. 466), and is inimical to plaintiff's contention here.

It follows from these considerations that the county is not precluded from disposing of the property bid in by it at the tax sales previous to plaintiff's purchases, but the sheriff may not offer the land for sale again for the taxes of 1896. The decree of the trial court will therefore be reversed, the demurrer sustained, and the cause remanded for such further proceedings as may seem proper.

REVERSED.

Argued 9 August, decided 17 October, 1904.

STATE v. LEASIA.

[78 Pac. 328.]

DATE OF TERMINATION OF MARRIAGE IN DEFAULT CASE.

1. In view of the provision of Section 548 of B. & C. Comp., that no appeal can be taken from a default decree, a final order of divorce entered for want of an answer operates to at once terminate the marriage relation, so that thereafter the woman is a competent witness against the man in a criminal case.

PAROL EVIDENCE OF LOST WRITING.

2. Testimony of one witness that she heard defendant read a letter that he had written to a third person, which letter he had hidden, and that she had not been able to find it, is sufficient evidence of the letter to justify oral proof of its contents.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Martin V. Leasia appeals from a conviction of murder in the second degree. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. Dan R. Murphy*.

For the State there was a brief over the names of *Andrew M. Crawford*, Attorney General, and *John Manning*, District Attorney, with an oral argument by *Mr. Manning*.

MR. JUSTICE WOLVERTON delivered the opinion.

The defendant is charged by the information of the district attorney with the crime of murder in the first degree, and was convicted of murder in the second. At the trial, Mrs. Pauline Leasia being called as a witness for the State, defendant objected that she was incapacitated to testify against him without his consent, because the marital relations formerly existing between them had not been finally severed at the time the events occurred about which it was desired that she should bear witness, and, the objection being overruled, error is assigned.

1. The crime with which the defendant is accused was committed on May 24, 1903. Preceding that, on the 18th day of the same month, Mrs. Leasia procured a decree of

divorce against him in the Circuit Court of the State of Oregon for Multnomah County, he having failed to appear, or answer, or otherwise plead in the cause, although due service of summons had been had upon him. However, on the 15th day of June following, he gave notice of appeal from the decree to the supreme court, and filed the undertaking required by law in such cases. Mrs. Leasia testified relative to the circumstances of the homicide occurring on the date as charged and events that subsequently transpired, and the contention of counsel for defendant is, in purport, that the decree of divorce did not operate to sever the marital relations of the parties until finally determined upon the appeal, and that, under the existing conditions, the parties were to all intents and purposes husband and wife. Whatever might be the effect of an appeal regularly and duly taken in suspending or intermitting the operation of the decree of the trial court while the appeal is pending (a matter not necessary for us to decide at this time), it is perfectly manifest that an attempted appeal where none lies could have no possible effect upon the finality of the decree sought to be revised. No appeal lies from a judgment or decree given by confession or for want of an answer: B. & C. Comp. § 548; *Fassman v. Baumgartner*, 3 Or. 469; *Smith v. Ellendale Mill Co.* 4 Or. 70; *Trullenger v. Todd*, 5 Or. 36; *Rader v. Barr*, 22 Or. 495 (29 Pac. 889); *Askren v. Squire*, 29 Or. 228 (45 Pac. 779). Having failed to appear in the divorce proceeding, Leasia was wholly without the right of appeal, and any attempt that he might have made in that direction was ineffectual to carry the case to the higher tribunal, and, *a fortiori*, was unavailing to disturb the final effect of the decree itself, which terminated the marriage as to both of the parties: B. & C. Comp. § 515. There being no appeal, the decree became operative and finally effective when rendered, so that the objection is not well

assigned, Mrs. Leasia not being the wife of Leasia at the time of the occurrence of the events about which inquiry was made.

2. This leaves but one other question. Mrs. Leasia testified that immediately after the homicide the defendant compelled her to accompany him into the woods; that while there defendant took from his person a letter in his own handwriting, written prior to the homicide, and addressed to his people, which he read to her, she at the same time looking upon the writing and following him as he read; that after reading the letter he hid it under a log or stump near by, and they shortly left the place, traveling in a circuitous and obscure way until they came to a barn, where the defendant was apprehended by an officer. She further testified that she had since made diligent search for the place where the letter was hidden, and for the letter itself, but had been unable to find either. Thereupon she was permitted to give evidence of the contents of the letter, and error is assigned in that relation. The objection is directed not so much to the quantum of evidence given to show the loss of the letter preliminary to allowing parol evidence of its contents as to the sufficiency of the testimony to establish the fact of the existence of such a writing at any time, it being insisted that the proof must be clear and convincing in that regard, or else it cannot be considered. The action here is not upon the instrument or writing itself as the basis of the right of recovery, as was the case in *Gillis v. Wilmington, etc., R. Co.*, 108 N. C. 441 (13 S. E. 11, 1019), cited by counsel, but the latter is sought to be established as an incident in the proofs of the State to show the guilt of the accused through his admissions. If the letter in fact existed, it contained admissions of the defendant as to his preconceived intention to take the life of the deceased. If he had made the statements which it is said to contain to the witness orally,

without reading from or exhibiting the letter, there could be no question that her evidence of the statements would be pertinent and competent and admissible for what they were worth, and it would not depend upon any such contingency or qualification as that it must be clear and convincing. But, as he read the statements to her from a letter or writing, her testimony as to what was contained therein becomes secondary evidence, which she is allowed to give after showing its loss. Now, it does not seem reasonable or necessary that to be admissible her evidence as to the existence of such a document should be required to be any clearer or of more convincing character than her evidence as to its contents. Of course, there must have been a writing in existence before there could be any contents, but her testimony that she saw the writing, and followed him in reading it, was some proof of its existence, competent to go to the jury as to the fact, in like manner as her testimony as to its contents. The statute prescribes that the direct evidence of one witness who is entitled to full credit is sufficient proof of any fact, except usage, perjury, and treason (B. & C. Comp. § 693), and, the credibility of the witness being for the jury, the whole question whether the fact is established becomes a matter for the jury. Nor does it change the issue that the witness is contradicted by other witnesses, the duty of the jury being then to determine who is worthy of the greater credit. The entire question relative to the existence of the instrument is therefore one for the jury to determine according to the weight or preponderance of the testimony as other facts are determined, with this qualification: that in the end in criminal cases the jury must be convinced beyond a reasonable doubt of the guilt of the accused before they can convict.

Finding no error in the record, the judgment of the circuit court will be affirmed.

AFFIRMED.

Argued 9 August, decided 17 October, 1904.

FRAZIER v. WESTERN UNION TELEGRAPH CO.

[78 Pac. 330, 67 L. R. A. 319.]

TELEGRAM — RIGHT OF ACTION OF ADDRESSEE.

1. The addressee of a telegram may sue for damages caused by the failure to deliver it only when it is for his benefit and the telegraph company knows, or is chargeable with knowledge of, that fact.

NATURE OF BUSINESS OF TELEGRAPH COMPANY.*

2. A telegraph company is a public service corporation and must, under penalty of damages, and with reasonable promptness, transmit and deliver messages to or for those for whose benefit they are sent.

EXTENT OF LIABILITY FOR DELAYED OR CHANGED TELEGRAMS.

3. The damages recoverable for delays in delivering telegrams, or for changes in cipher dispatches, are such as must have reasonably been expected to result from the breach of the contract, unless the company is informed of their nature or importance.

CASE UNDER CONSIDERATION.

4. A telegram addressed to a firm of real estate brokers: "See S. Take his last offer. Wire me at F."—does not show that it was for the benefit of the addressees, and hence, in the absence of any other notice to the telegraph company that such was the case, the addressees cannot sue for failure to deliver it.

From Marion: ARTHUR L. FRAZER, Judge.

Action by P. L. Frazier and others against the Western Union Telegraph Company. The plaintiffs are real estate brokers. Some time prior to February 18, 1903, two farms were listed with them for sale, designated in the record as the "Shepard" and "Schutte" farms, under an agreement with the owners that plaintiffs were to receive \$100 commission on the former and \$200 on the latter if they effected a sale. About that time they had a customer in the person of one E. P. Weir, who, after examining the property and entering into some negotiations with the owners, started for California, informing the plaintiffs that he would advise them if he concluded to take the property. On reaching Ashland he wrote, signed, and de-

* NOTE. — See the following notes:

Transmission and Delivery of Telegraphic Messages, 8 Am. Electl. Cas. 891, 912.

What are Proper Elements of Damage in Actions Against Telegraph Companies for Failure to Send or Deliver Messages, 10 Am. St. Rep. 778, 790, and 791.

REPORTER.

livered to the agent of the defendant at that place, for transmission to the plaintiffs, the following dispatch :

"Ashland, Ore., Feb. 18, '03.

To Frazier & Long, Salem, Ore.:

See Shepard. Take his last offer. Wire me at 'Frisco.
E. P. Weir."

The message was sent to the agent of the defendant at Salem, who received it about 1:20 in the afternoon of the day it bears date. It was not delivered to the plaintiffs, however, until some five days thereafter, by reason of which delay they claim they have lost their commission on the sale of the property referred to, and therefore bring this action against the company to recover the amount of such commission as damages for its negligence in not promptly delivering the message. The plaintiffs were nonsuited, and appeal. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. B. F. Bonham* and *Mr. Cary F. Martin*, to this effect.

I. Appellants' claim for damages in this case was not too remote and uncertain: 2 Sedgwick, Damages (8 ed.), §§ 881, 882, 891, 892; 1 Sutherland, Damages (2 ed.), § 45; *Blagen v. Thompson*, 23 Or. 239 (18 L. R. A. 315, 31 Pac. 647); *Wisner v. Barber*, 10 Or. 342 (5 Am. & Eng. Enc. Law, pp. 5-10); *Western Union Tel. Co. v. Scircle*, 103 Ind. 227 (2 N. E. 604, 1 Am. Electl. Cas. 787); *Shearman & Red.*, Negligence, §§ 739, 740, 745; *Chapman v. Western Union Tel. Co.* 90 Ky. 265 (3 Am. Electl. Cas. 370, 13 S. W. 880); *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575 (3 Am. Electl. Cas. 630, 7 L. R. A. 474, 19 Am. St. Rep. 55, 23 N. E. 583); *Western Union Tel. Co. v. Cornwell*, 2 Colo. App. 491 (31 Pac. 393); *Baldwin v. Western Union Tel. Co.* 93 Ga. 692 (44 Am. St. Rep. 194, 21 S. E. 212).

II. The law does not require that a telegraph company should be apprised of the details as to the purpose of the

message. If the message, as delivered, discloses its importance as a business communication in general terms, that is all that is required of the sender: *Sutherland, Damages* (2 ed.), §§ 960, 970; *Brooks v. Western Union Tel. Co.* 26 Utah, 147 (72 Pac. 499); 25 Am. & Eng. Enc. Law (1 ed.), 845.

III. The question whether a message is on its face such as to disclose the nature of the business, and notify the defendant that its prompt delivery is necessary, is purely a question of fact, and should be submitted to the jury: *Pope v. Western Union Tel. Co.* 14 Ill. App. 531 (1 Am. Electl. Cas. 615); *Western Union Tel. Co. v. McKibben*, 114 Ind. 511 (2 Am. Electl. Cas. 525, 14 N. E. 894).

For respondent there was a brief and an oral argument by *Mr. George G. Bingham* and *Mr. Cyrus A. Dolph*, to this effect:

1. There having been no contractual relation between the appellant and respondent, there can be no recovery for a breach of contract: *Postal Tel. Co. v. Ford*, 117 Ala. 672 (23 So. 684); *Western Union Tel. Co. v. Wood*, 57 Fed. 471 (21 L. R. A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 4 Am. Electl. Cas. 838).

2. Recoverable damages must be certain in their nature, and in respect to the cause from which they proceed: *Wisner v. Barber*, 10 Or. 342; *Blagen v. Thompson*, 23 Or. 239 (18 L. R. A. 315, 31 Pac. 647).

3. The damages claimed are too remote, they are not the approximate consequence of the nondelivery of the message: *Beatty Lum. Co. v. Western Union Tel. Co.* 52 W. Va. 410 (44 S. E. 309); *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328 (53 Pac. 252); *Western Union Tel. Co. v. Cooper*, 71 Tex. 507 (1 L. R. A. 728, 10 Am. St. Rep. 772, 9 S. W. 598, 2 Am. Electl. Cas. 795).

4. Where the company is to be held for more than

nominal damages, it should have notice from the face of the message, or otherwise, of its importance: *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328 (53 Pac. 252); *Gulf, C. & S. F. R. Co. v. Loonie*, 82 Tex. 323 (27 Am. St. Rep. 891, 18 S. W. 221).

MR. JUSTICE BEAN, after stating the case in the above terms, delivered the opinion of the court.

Several questions were discussed at the argument, but it is only necessary to notice the contention that the plaintiffs are not entitled to maintain an action against the defendant for negligence in delivering the message addressed to them, because they were not parties or privies to the contract between Weir and the company for its transmission, nor was the company advised by the terms of the message or otherwise that they were the parties for whose benefit such contract was made.

1. In England the doctrine is settled that the addressee of a telegraphic message cannot sue the company for error or negligence in its transmission or delivery, because the obligation of the company springs entirely from the contract between it and the sender, and the addressee is not a party or privy thereto: *Playford v. United Kingdom Tel. Co.* L. R. 4 Q. B. 705. This doctrine, however, does not prevail generally in this country, and the weight of authority is that the addressee of a message may sue the telegraph company in his own name, and recover such damages as he may have sustained by reason of its negligence, when the message was intended for his benefit, and the company had knowledge of that fact: 2 Shearman & Red., *Negligence* (5 ed.), § 543; Gray, *Com. by Tel.* § 65; Thompson, *Law of Electricity*, § 427; Joyce, *Electric Law*, § 1008; 21 Enc. Pl. & Pr. 509.

2. A telegraph company is not a common carrier in the sense that it is an insurer against mistakes in the trans-

mission of messages or delay in their prompt delivery, but it is an instrument of commerce and a public service corporation. It therefore owes the duty to those for whose benefit it undertakes to transmit and deliver messages to transmit and deliver them without unreasonable delay. For a violation of this duty, or for a negligent performance thereof, it is responsible to the party for whose benefit the contract was made, whether it be the sender or the addressee: 27 Am. & Eng. Enc. Law (2 ed.), 1024; Thompson, Electricity, § 427; *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328 (53 Pac. 252); *Webbe v. Western Union Tel. Co.* 169 Ill. 610 (48 N. E. 670, 61 Am. St. Rep. 207); *McPeck v. Western Union Tel. Co.* 107 Iowa, 356 (78 N. W. 63, 43 L. R. A. 214, 70 Am. St. Rep. 205).

But the right of an addressee to recover is necessarily grounded upon the contract between the company and the sender, whether the action be in form technically for a breach of contract or one sounding in tort. Without the contract under which the message was forwarded as a foundation for the cause of action, no recovery whatever could be had. In order for the addressee to sue, it is essential, therefore, that it appear that he was to be benefited by the contract for sending the message, and that fact was known to the company when it received the message for transmission, either from its language or otherwise. The addressee can maintain an action only on the theory that he was the party intended to be benefited by the contract between the sender and the company, and that he is injured by a failure to perform such contract. Messrs. Shearman & Redfield say that the right of an addressee of a telegraphic message to sue for the negligence of the company, either in its transmission or delivery, rests on the principle that, where two persons make a contract for the benefit of a third person, such third person may sue upon it: 2 Shearman & Red., Negligence (5 ed.), § 543.

Under this doctrine the right of an addressee to sue does not exist unless the sender of the message and the company, at the time the contract for its transmission was made, understood that it was for the benefit of such person. Mr. Gray, in his work on Communication by Telegraph, says: "It may be hazarded that the right of the person to whom a message is directed to sue as beneficiary for a breach of the contract to communicate that message—a contract to which he is not a party—will, where it is admitted at all, be restricted to the comparatively small class of cases in which the person who employs a telegraph company to communicate a message does so solely to benefit the person to whom the message is directed; for where the person who employs a telegraph company to communicate a message does so to benefit himself there is no ground for the interpretation that he intends to part with his right of action for a breach of the contract": Gray, Com. by Tel. § 67. Mr. Croswell says: "To give the addressee the benefit of this rule, it must appear either from the language of the message or the circumstances under which it is sent, and which are known to the telegraph company, that the message is sent for the benefit of the addressee": Croswell, Electricity, § 457.

The Supreme Court of Texas, in *Western Union Tel. Co. v. Adams*, 75 Tex. 531 (3 Am. Electl. Cas. 768, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920), in discussing this question, says: "We think the question as to who may maintain a suit for damages for the breach of contract does not depend upon the payment of the fee, nor upon the question whether the sender had been previously constituted an agent for that purpose by the party to whom the dispatch is sent, but who in fact was to be served and who is damaged. If it was intended to serve the receiver, and he accepts the act, we are unable to see why the telegraph company should be excused from the consequences

of its neglect to discharge its own duty by reason alone of its ignorance of the relations that may exist between the sender and the receiver of the message." In *Western Union Tel. Co. v. Wood*, 57 Fed. 471 (6 C. C. A. 432, 4 Am. Electl. Cas. 838, 21 L. R. A. 706), and *Butner v. Western Union Tel. Co.* 2 Okl. 234 (5 Am. Electl. Cas. 758, 37 Pac. 1087), it is held that a person to whom a telegraphic message is directed cannot recover against the company for a failure to deliver when he is not a party to the contract under which it was sent, and when the company is not informed, either by the terms of the message or otherwise, that the contract was for his benefit.

3. The liability of a telegraph company for damages resulting from error in the transmission or failure to deliver a message promptly is limited to such as may fairly be considered according to the usual course of things to have arisen from the breach of the contract actually made between it and the sender, and which both parties must reasonably have understood and contemplated, when making the contract, would be likely to result from its breach. It is accordingly quite generally held that in an action for a failure to transmit correctly or deliver promptly a cipher or unintelligible dispatch, when the company is not informed of its nature, or the importance or extent of the business to which it relates, the measure of damages is merely the sum paid for sending it: 27 Am. & Eng. Enc. Law (2 ed.), 1062; *Primrose v. Western Union Tel. Co.* 154 U. S. 1 (5 Am. Electl. Cas. 809, 14 Sup. Ct. 1098). This is on the theory that the measure of the company's responsibility depends upon the nature and character of the contract, its knowledge of special circumstances and of the purpose of the dispatch which it agrees to transmit and deliver. In a word, the measure of its responsibility is determined by the contract which it makes with the sender of the message. Now, if the proper criterion by

which to determine the measure of responsibility of the company in the matter of damages is the contract between it and the sender, it would seem clear that upon the same principle the person or persons to whom it is to be liable must be ascertained from the same source, and that it is liable only to such persons as it may have expressly agreed to serve, or who are the beneficiaries of the contract made with it, and such we believe to be the decisions.

4. An exhaustive examination of the cases holding that the addressee of a telegraphic message may sue the company for negligence discloses that in all of them the company knew or was chargeable with knowledge that the message was for his benefit. No case has come under our observation where the addressee was permitted to sue under any other circumstances. On the contrary, those already cited show that he has been denied relief where the contract was not for his benefit. In the present case the message sent by Weir to the plaintiffs does not disclose that they were the parties intended to be benefited by the contract between him and the company for its transmission and delivery, or that they had any interest whatever in the subject-matter, nor was the company otherwise advised of that fact. The message is a mere direction from Weir to the plaintiffs to perform some act for him, and the company could not have understood from it that it was intended for the benefit of the plaintiffs, or that they would be injured by its nondelivery. If the message had been directed to them as real estate brokers, or if the company, at the time it received and agreed to transmit it, knew that they were engaged in that business, or if the message had simply advised them that Weir would take the Shepard farm at the price named, without more, the facts might possibly bring the case within the doctrine of some of the decisions holding that an addressee may sue the company for negligence in not delivering the

message. The message in question, however, is not of that character. It indicates on its face that it was sent for the benefit of Weir, and therefore it cannot be held that the contract between Weir and the company for its transmission was made for the benefit of the plaintiffs.

The judgment will be affirmed.

AFFIRMED.

Argued 6 July, decided 1 August, rehearing denied 30 October, 1904.

BLACKBURN v. LEWIS.

[77 Pac. 746.]

TAX DEED — EFFECT OF STATUTE IN FORCE AT TIME OF SALE.

1. A tax deed is to be construed with reference to the statute in force when the tax sale was made, unless a subsequent statute has been made retrospective.

ASSESSMENT OF UNOCCUPIED LAND — STATUTES.

2. Hill's Ann. Laws, § 2735, provided that unoccupied land, if the owner was unknown, should be assessed as such, without inserting the name of the owner; and section 2775 declared that unoccupied land liable to taxation, when the owner was unknown, should be described, and the value thereof set down separate from other assessments, and the value thereof designated. *Held*, that the words "as such," in section 2735, referred to unoccupied land, and not to unknown owner, and, that said sections, construed together, required that unoccupied land, if the owner was known, should be assessed in the usual way to the owner and under his name; but unoccupied land, if the owner was unknown, could not be assessed at all. An assessment of land to "unknown owner," without a further designation as unoccupied was void.

ESTOPPEL TO DENY VALIDITY OF TAX.

3. A grantee of land under a deed subject "to all unpaid taxes and sales for the same," is not thereby estopped to deny the validity of a previous tax sale, where the assessment on which the sale was based was wholly void.

ALLEGATIONS AND PROOFS — ISSUES IN PLEADINGS.

4. Cases must be tried and decided on the issues made by the pleadings. Courts cannot undertake to pass on matters not thus involved; for instance, in a suit to remove a cloud on title, plaintiff not having claimed in the pleadings for improvements placed on the land, he is not entitled to recover for such improvements on his title being declared void.

From Multnomah: MELVIN C. GEORGE, Judge.

Suit by J. E. Blackburn against Leander Lewis to quiet title. In an ejectment action by Lewis for the same land, he prevailed: *Lewis v. Blackburn*, 42 Or. 114 (69 Pac. 1024). Thereafter Blackburn began this proceeding in equity. Decree for defendant.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Joel N. Percy* and *Mr. John T. McKee*.

For respondent there was a brief over the names of *Lawrence A. McNary* and *William M. Gregory*, with an oral argument by *Mr. Gregory*.

MR. JUSTICE WOLVERTON delivered the opinion.

This is a suit by plaintiff, claiming under a tax deed, to remove a cloud from title. The defendant claims under deed by regular conveyances from Ladru Royal and J. D. Hart, who, it is conceded, are the common source of title as between the parties. The defendant's title is regular, if the tax deed has not divested him of it, and the whole question turns upon the validity of such deed. It is based upon a sale for delinquent taxes for the year 1892, and an amendatory deed executed by W. A. Storey, as sheriff and tax collector of Multnomah County, Oregon, October 2, 1902. The former deed, which was executed November 9, 1897, by William Frazier, former sheriff and tax collector, having been declared inoperative and void by this court in the case of *Lewis v. Blackburn*, 42 Or. 114 (69 Pac. 1024), there is a question here touching the authority of the sheriff to execute an amendatory deed of the kind, under our statute; but we may pass that over, as the second is also void for another reason.

1. But before reaching that question, it is well to premise that the validity of a tax deed is to be tested by the statute in force when the sale was made, unless there is some expression denoting an intendment that the later act should operate retrospectively: Black, *Tax Titles* (2 ed.), § 410; 2 Blackwell, *Tax Titles* (5 ed.), § 795; *Strode v. Washer*, 17 Or. 50, 56 (16 Pac. 926); *Woodman v. Clapp*, 21 Wis. 350, 360; *McCann v. Merriam*, 11 Neb. 241 (9 N. W. 96); *Baldwin v. Merriam*, 16. Neb. 199 (20 N. W. 250); *Capital State Bank v. Lewis*, 64 Miss. 727 (2 South.

242); *Conway v. Cable*, 37 Ill. 82 (87 Am. Dec. 240). We do this to show that the effect of the deed in question, as to its conclusiveness as evidence, should be measured by the provisions of Section 2823, Hill's Ann. Laws, as it stood at the time of the assessment and levy of the tax and the sale for its delinquency, and not in its amended form (B. & C. Comp. § 3127); there not appearing to be any sufficient legislative declaration attending the amendment indicating an intendment that the deed thereby provided for should apply to any former sales.

2. Now, as to the sufficiency of the tax deed to pass the title. Section 2735, Hill's Ann. Laws, provided that unoccupied land, if the owner was unknown, should be assessed as such, without inserting the name of the owner; and Section 2775, Hill's Ann. Laws, 1892, that unoccupied land liable to taxation, when the owner was unknown, should be described, and the value thereof set down in the assessment roll, in a part thereof separate from other assessments, in the same manner that lands of residents are required to be described, and the value thereof designated. These sections, when construed together, as they should be, simply mean that unoccupied land, if the owner be unknown, should be assessed as such—that is, as unoccupied land—and should be described and valued in a separate part of the assessment roll from other assessments. The words “as such” have relation to unoccupied land, not to unknown owner, and an assessment of land of that kind, where the owner was unknown, by a substantially different form, was unknown to the statute, and therefore unauthorized and void. If unoccupied land was found, and the owner known, it simply took the regular course, and was assessed in the name of the owner, so that no land of that description would escape assessment by construction. But it is argued that occupied land, where the owner is unknown, would escape assessment,

unless assessable under the designation of "unknown owner." To this there is but one answer. The statute seems not to have made provision for the manner of assessment of that particular kind of land, and it must be regarded as an oversight of the legislature, or else it assumed that all such land would have a known owner. But however that may be, the loss in revenue could not be of any considerable proportion if it did escape, for land of that description must necessarily be very limited in amount. The statute provided only for the assessment of unoccupied, not occupied, land, when the owner was unknown; and it was to be assessed as "unoccupied land," or, rather, in such a case the assessment was to be *in rem* — that is, against the thing, as contradistinguished from the general plan or scheme, which was *in personam*, or against the person: *Middleton v. Moore*, 43 Or. 357 (73 Pac. 16). The distinction is radical and fundamental, and an assessment by one method where the law prescribes the other is admittedly such a departure from the mandate of the law as to render it utterly void. The premises in question were assessed to "unknown owner," the designation appearing in the column headed "Names of Taxpayers," and there was nothing to indicate that it was unoccupied land. Such an assessment is manifestly not *in personam*, for it is against no one, and it cannot stand upon that hypothesis. But to be assessable *in rem* — that is, against the thing, the land — it must have been unoccupied land, and nothing appears to indicate that it was of such a description. So that there was no assessment upon either basis. The proper method would have been to have assessed it as "unoccupied land," or under that designation "owner unknown." But it was not pursued, and the attempted assessment cannot be considered otherwise than ineffectual and nugatory.

3. Another proposition insisted upon by plaintiff is that, as the defendant holds under a deed purporting to convey the premises in question subject "to all unpaid taxes and sales for the same," he is estopped to deny the validity both of the tax, and the sale of the lot had in pursuance thereof, and consequently of the tax deed under which plaintiff claims title. The principle is ordinarily invoked where a deed is made subject to incumbrance, and it becomes apparent that the incumbrance constituted part of the consideration for the premises conveyed. In such a case the grantee, having thus recognized the existence of the incumbrance, and having secured a corresponding reduction of the purchase price on account of it, is estopped to deny its validity. But the principle could hardly apply where there was never any incumbrance, either colorable or otherwise, as in the case at bar, where there is absolutely no assessment; the property having been listed, as we have seen, to "unknown owner," or no one, whereas it should have been assessed *in rem*, as unoccupied land. There being no assessment, there could not be any tax, and any sale for a supposed tax that had not even a colorable existence would, of course, be entirely nugatory (*Jory v. Palace Dry Goods Co.* 30 Or. 196, 46 Pac. 786), so that a conveyance subject to all taxes and sales for same could not logically operate to preclude the grantee from denying the validity of a deed which had no foundation whatever—either in law, equity, or good morals—for its support. The position insisted upon is therefore untenable.

4. Some claim is also made for improvements placed upon the premises by plaintiff. The pleadings, however, present no such issue, and the subject-matter is not before us for consideration.

These considerations lead to an affirmance of the decree of the circuit court, and such will be the order of this court.

AFFIRMED.

Argued 13 October, decided 31 October, 1904.

CARTER v. WAKEMAN.

[78 Pac. 362.]

WAIVER OF OBJECTION TO DEPOSITION — CONSTRUCTION OF STIPULATION.

1. A stipulation consenting to the use of a typewritten copy of the testimony of certain decrepit witnesses instead of the original, is not a waiver of proof that the witnesses were still infirm and unable to appear, which Section 840, B. & C. Comp., requires to be shown before such depositions can be used.

PRESUMPTION OF CONTINUED INFIRMITY OF WITNESS.

2. The provision of Section 840, B. & C. Comp., that before the deposition of an infirm witness can be used, it must be shown that the infirmity continues, is not affected by the presumption of the continuance of things once shown to exist, declared by B. & C. Comp. § 783, subd. 33, so that before such depositions can be read proof of continued infirmity must be made.

PRESUMPTION AS TO EFFECT OF ERROR.*

3. Error is presumptively prejudicial and is ground for reversal unless it affirmatively appears from the record that it was harmless.

From Jackson: HIERO K. HANNA, Judge.

Action by Nancy Carter against Miles S. Wakeman, in which defendant had a judgment. REVERSED.

For appellant there was a brief over the names of *H. D. Norton*, *J. L. Hammersley*, and *E. B. Dufur*, with an oral argument by *Mr. Norton*.

For respondent there was a brief over the names of *Colvig & Durham* and *Chas. Prim*, with an oral argument by *Mr. Geo. H. Durham*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is a second appeal by plaintiff from a judgment rendered against her, a statement of the case appearing in the former opinion: *Carter v. Wakeman*, 42 Or. 147 (70 Pac. 393). Prior to the last trial, defendant's counsel, desiring to take the depositions of *W. P. Hillis* and *Sarah C. Wakeman*, filed affidavits showing the materiality of the testimony expected to be secured from such persons and of their inability to attend as witnesses in consequence of

*NOTE.— See also, *Durkee v. Curr*, 38 Or. 180.

the decrepitude of each, and, based thereon, the court made an order permitting their depositions to be taken before a designated person, specifying the notice required and the time within which such evidence might be secured. Thereupon counsel for the respective parties stipulated that the testimony of such persons might be taken by the referee appointed; that at the completion of their examination the deposition was to be signed by the witness giving it; that the referee was to make a typewritten copy thereof and file the same, together with the original, within ten days; and that such copy might be used as evidence on the trial in the same manner as the original could be employed. The depositions, having been taken pursuant to the court's order and in the manner stipulated, were offered in evidence at the trial, and, over plaintiff's objection that each was incompetent, irrelevant, and immaterial, and that no foundation for its introduction had been laid, they were received, and exceptions reserved. It is contended by plaintiff's counsel that, as no proof was made tending to show that the witnesses continued infirm, the court erred in admitting their depositions.

The statute regulating the taking of written declarations under oath, made upon notice to the adverse party, so far as deemed material herein, is as follows: "The testimony of a witness in this State may be taken by deposition * * (4) when the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend": B. & C. Comp. § 826. "If a deposition be taken under subdivision * * 4 of section 826, before the same can be used, proof shall be made that the witness * * still continues * * infirm": B. & C. Comp. § 840. The bill of exceptions shows that no compliance with the provisions of the latter section was attempted. It is insisted by defendant's counsel, however, that the depositions were admissible in evidence on the grounds: (1) That they were practically secured pursu-

ant to a stipulation; (2) it is to be presumed that the reason assigned for taking them, when used so soon after they were filed, continues, unless the contrary is shown; (3) the evidence contained in each was only cumulative, and therefore not prejudicial; and (4) if their admission was improper, the error was harmless and should be disregarded.

1. Considering the legal principles last presented in the order stated, the rule is universal that a party can waive any statutory provision that inures to his benefit, unless his agreement to relinquish a known right violates the rules of public policy. Thus, if a party by stipulation expressly waives all objections to the manner of taking a deposition, reserving only questions of the relevancy, materiality, and competency of the testimony, he thereby abandons every right to which he is entitled, except such as are specially excepted: *Ex parte Kindt*, 32 Or. 474 (52 Pac. 187). In the case at bar the only departure from a strict performance of the requirements of the statute consented to by the defendant consists in the admission of a typewritten copy of the testimony instead of the original. This was not an express waiver of the right to insist on making the necessary proof of the continuance of the witnesses' infirmity.

2. Though the statute provides that a thing once proved to exist continues as long as is usual with things of that nature (B. & C. Comp. § 788, subd. 33), we do not think the deduction which the law expressly directs to be made from particular facts can be invoked to overcome the express provisions of the statute, for, if this were so, it would only be necessary in the first instance to make a showing so as to secure the taking of a deposition, thereby imposing on the adverse party the duty of overcoming the presumption by direct evidence.

3. If it be assumed that the depositions only corroborated the testimony introduced at the trial by defendant, it is impossible to determine what degree of importance the jury attached to such evidence, for the triers of the fact may have considered the written declarations under oath, made in pursuance of notice to the adverse party, sufficient to create a preponderance, and based their verdict on that conclusion. When it is manifest that an error has been committed, prejudice will be presumed, unless it affirmatively appears from an inspection of the record that no prejudice could have resulted therefrom: *Inverarity v. Stowell*, 10 Or. 261; *Du Bois v. Perkins*, 21 Or. 189 (27 Pac. 1044); *Nickum v. Gaston*, 24 Or. 380 (33 Pac. 671, 35 Pac. 31); *Carney v. Duniway*, 35 Or. 131 (57 Pac. 192, 58 Pac. 105).

The court undoubtedly admitted the evidence so objected to on the assumption that the agreement of the parties waived the performance of the statute requiring proof to be made that the witnesses still continued to be infirm before their depositions could be used; but, believing that the stipulation was not sufficient for that purpose, the judgment is reversed and a new trial ordered.

REVERSED.

Decided 17 October, 1904.

SLATE v. HENKLE.

[78 Pac. 325.]

EXECUTOR DE SON TORT—STATUTORY CHANGE OF COMMON-LAW RULE.

1. The effect of the enactment of Section 385 of B. & C. Comp. has been to so change the common-law rule as to the liability of an executor de son tort that he is now liable only to the legal representative of the deceased for the results of his interference.

SET-OFF IN FAVOR OF EXECUTOR DE SON TORT.

2. An heir who acted as administrator of his ancestor's estate under an appointment void because made in the wrong county, if he is afterward sued for conversion by the rightful administrator, may set-off such sums as he has paid out of the estate for its benefit.

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EXECUTOR DE SON TORT—CROSS-BILL—ADEQUATE LAW REMEDY.

3. In an action for conversion by a legal representative of a decedent against an executor de son tort the latter may show as an off-set under the general issue such payments made by him officially as the lawful representative would have been bound to make, and he therefore has an adequate remedy at law, so that he cannot maintain a cross suit in equity to recover the value of his expenditures.

ACCOUNTING WITH EXECUTOR DE SON TORT—ITEMS DISALLOWED.

4. An administrator de son tort is not entitled on an accounting to an allowance for sums paid to a surety company for becoming surety on his bond, or for appraisers' and justices' services in taking acknowledgments, nor for services rendered by him or his attorneys, unless such services were rendered in the preservation of the property of the estate, and were conducive to its benefit.

IDEM.

5. On an accounting by an executor de son tort, he is not entitled to any fees as executor, and if the fees have been paid they must be returned, such executor being liable to the *de jure* executor therefor.

From Linn: REUBEN P. BOISE, Judge.

Statement by MR. CHIEF JUSTICE MOORE.

This is a suit to recover expenses incurred and fees claimed to have been earned in the alleged administration of a decedent's estate. Frances Slate, an inhabitant of Benton County, died intestate therein November 22, 1895, and, having left real and personal property in Linn County, the county court thereof, on May 16, 1900, appointed her son, Porter Slate, the plaintiff herein, administrator of her estate, who gave the required undertaking and received letters of administration. Thereafter the county court of Benton County appointed J. E. Henkle, the defendant herein, administrator of such estate, who, having duly qualified, instituted a suit against Slate, and secured a decree discharging him: *Slate's Estate*, 40 Or. 349 (68 Pac. 399). Henkle thereupon began an action against Slate to recover \$600 for the use of such real property and the sum of \$230.70 for certain personal property belonging to the decedent's estate, which it was alleged he had converted to his own use. Slate, having answered in such action, also filed the complaint herein in the nature of a cross-bill in equity, alleging, in effect, that, relying upon his appointment as administrator, and acting in good faith, he

sold certain personal property belonging to the decedent's estate, realizing therefrom the sum of \$191.98, and that he had paid on account of expenses incurred in administration the following sums:

Taxes on the decedent's property.....	\$ 8 00
To a surety company for responsibility assumed on his undertaking.....	50 00
To appraisers.....	6 00
To justice's fees administering oaths to appraisers.....	2 00
To baling hay.....	14 50
To hauling hay to market.....	5 85
To storing hay in a warehouse.....	5 82
To attorney's fees.....	100 00
Total.....	<u>\$ 192 17</u>

Slate further alleges that he was entitled to \$100 for service performed in caring for the decedent's property from May 16, 1900, to March 3, 1902; and that he had no plain, adequate; or speedy remedy at law. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of suit, was overruled, and, the defendant herein (Henkle) declining further to plead or answer, a decree was rendered requiring him to pay the sums so incurred and demanded, and he appeals.

REVERSED.

For appellant there was an oral argument by *Mr. W. R. Bilyeu* and *Mr. L. L. Swan*, with a brief over the names of *W. R. Bilyeu*, *L. L. Swan*, and *W. S. McFadden*, to this effect.

I. All acts done under a void appointment are as if done by a stranger: Black, Judgments, § 218; Freeman, Judgments, (3 ed.) § 117; Woerner, Administration, (2 ed.) §§ 144, 266, 274.

II. Trespasser or executor de son tort can acquire no benefit by his own wrongful act: 1 Williams, Executors, 312; Woerner, Administration, (2 ed.) § 194.

III. All the relief that Slate is entitled to can be obtained in a court of law: *Rutherford v. Thompson*, 14 Or. 236, 242 (12 Pac. 382); *Saam v. Saam*, 4 Watts, 432; *Weeks v. Gibbs*, 9 Mass. 74, 77; *Cary v. Guillow*, 105 Mass. 18, 21 (7 Am. Rep. 494); 1 Williams, Executors, 316; 7 Am. & Eng. Enc. Law (1 ed.) 189; Woerner, Administration, (2 ed.) § 195.

For respondent there was an oral argument by *Mr. J. R. Wyatt* and *Mr. J. J. Whitney*, with a brief over the names of *Weatherford & Wyatt*, *Geo. W. Wright*, and *J. J. Whitney*, to this effect.

Slate was a *de facto* officer, and was bound to care for the property entrusted to him, which necessarily required some expenditures. The emoluments of an office depend upon the performance of the duties, and after performing the duties he is entitled to the rewards: *Smith v. Mayor*, 37 N. Y. 518; *McVeany v. Mayor*, 80 N. Y. 185 (36 Am. Rep. 600); *Stuhr v. Curran*, 44 N. J. Law, 181 (43 Am. Rep. 353); *Stebenville v. Culp*, 38 Ohio St. 18 (43 Am. Rep. 417); *Attorney General v. Davis*, 44 Mo. 131 (100 Am. Dec. 260); *Auditor v. Benoit*, 20 Mich. 176 (4 Am. Rep. 382); *Commissioners v. Anderson*, 20 Kan. 298 (27. Am. Rep. 171).

MR. CHIEF JUSTICE MOORE delivered the opinion.

1. It is contended by defendant's counsel that Slate had an adequate remedy in the law action to recoup all expenses that he had legitimately incurred in relation to the decedent's estate by alleging such facts in an answer to the complaint therein, and hence an error was committed in overruling the demurrer to the cross-bill and in rendering the decree herein. Any person who, without authority, intermeddled with the estate of a decedent, by doing such acts as properly belonged to the office of an executor or administrator, was originally denominated an

executor de son tort, who could be sued by the legal representative of the deceased, by a creditor of the estate, by a legatee, and, if all the debts were paid, by a distributee, and was liable to the extent of the assets which he had received: 11 Am. & Eng. Enc. Law (2 ed.), 1342, 1351. Our statute has abolished the common-law rule which made one who officiously interfered with the property of a deceased person an executor de son tort by depriving creditors of the estate and others of the remedy which they anciently possessed of charging the intermeddler as an executor of his own wrong; but the latter is now made responsible only to the legal representative of the decedent for the value of all property taken or removed and for all injury caused by his interference therewith: B. & C. Comp. § 385; *Rutherford v. Thompson*, 14 Or. 236 (12 Pac. 382). In the case at bar, the intestate, at the time of her death, not being an inhabitant of Linn County, the county court thereof had no jurisdiction of the subject-matter of her estate, and its letters of administration issued to Slate were therefore void: *Slate's Estate*, 40 Or. 349 (68 Pac. 399). The appointment being a nullity, Slate's possession and sale of the personal property belonging to the estate, if it were not for the immunity afforded by our statute, amending the common-law rule, would have rendered him an executor of his own wrong: 1 Abbott, Probate Law, § 407; *Bradley v. Commonwealth*, 31 Pa. 522. He undoubtedly had reason to believe and did believe that his appointment was valid, and this being so, every advantage that an executor de son tort can invoke should be applied in his favor.

2. The rule is universal that such an executor is subject to all the liabilities of an ordinary executor without being entitled to any of his privileges: 11 Am. & Eng. Enc. Law (2 ed.), 1351; 1 Woerner, Administration (2 ed.), § 193; 1 Williams, Executors, *216. The statute 43 Eliz. c. 8, so

far as material herein, enacted "That all and every person and persons that hereafter shall obtain, receive, and have any goods or debts of any person dying intestate, or a release or other discharge, or any debt or duty that belonged to the intestate, * * shall be charged and chargeable as executor of his own wrong; and so far only as all such goods and debts coming to his hands, or whereof he is released or discharged by such administrator, will satisfy, deducting nevertheless to and for himself allowance * * of all other payments made by him, which lawful executors or administrators may and ought to have and pay by the laws and statutes of this realm": 4 Bacon, Ab. (Bouv. Notes), 28. The enactment of this statute probably gave rise to the rule adopted by courts that just debts of a decedent which have been paid by an executor *de son tort* according to their legal priority may be set off against the amount of damages for which his intermeddling has rendered him liable: 11 Am. & Eng. Enc. Law (2 ed.), 1353; *Cook v. Sanders*, 15 Rich. Law (S. C.), 63 (94 Am. Dec. 139; *Bennett v. Ives*, 30 Conn. 329. Mr. Schouler, in his work on Executors and Administrators (section 188), in discussing the right of a person concerned in, but not the legal representative of, a decedent's estate, to be credited with expenses incurred in the due administration thereof, says: "The acts, moreover, of one having the color of a title or a claim to administration, and, like a widow, next of kin, legatee, or creditor, directly interested in preserving the estate, are, if so performed that the rightful allowance, share, legacy, or debt of the custodian may stand as indemnity for the transaction, treated with increasing indulgence, in contrast with those performed by some stranger who officiously intrudes." The editors of the American and English Encyclopedia of Law (1 ed. vol. 28, p. 499), in defining the word "volunteer," say: "A person who gives his services without any express or implied

promise of remuneration in return is called a volunteer, and is entitled to no remuneration for his services. * * But a person who, though not obliged to do an act, yet has an interest in doing it, is not necessarily a volunteer." In the case at bar it will be remembered that Slate is a son of the deceased, and was chosen administrator of her estate before Henkle was constituted the legal representative thereof. Slate's mother having died intestate, seised of real property in this State, he thereby became invested with the title to a share thereof (B. & C. Comp. § 5577), and also to a part of her personal property, after the payment of her debts and the distribution of allowances (B. & C. Comp. § 5578), and is directly interested in the settlement of her estate, and entitled to be credited with all reasonable sums paid out by him in the settlement thereof that resulted in a benefit thereto: *Rutherford v. Thompson*, 14 Or. 236 (12 Pac. 382).

3. This being so, it remains to be seen whether or not he had a plain, adequate, and complete remedy at law for the recovery of the sums so paid and for the services performed, for, unless such redress existed, he is not precluded from resorting to a suit in equity for the settlement of his reasonable demands: B. & C. Comp. § 390. Mr. Woerner, in his valuable work on the American Law of Administration (2 ed. § 195), in speaking of the right of an executor de son tort to recoup in an action instituted against him by the administrator to recover compensation for the injury sustained by reason of his intermeddling with the goods of a deceased person, says: "He may prove, however, under the general issue, in mitigation of damages, payments made by him in the rightful course of administration, because it is no detriment to the administrator *de jure* that such payments were made by the executor de son tort." Williams, in his work on Executors (American Notes by Randolph & Talcott, vol. 1, p. 316),

in discussing this subject, says: "With respect to the liability of an executor de son tort at the suit of the lawful representative of the deceased, there are several authorities to show that, if the rightful executor or administrator bring an action of trover or trespass, the executor de son tort may give in evidence, under the general issue, and in mitigation of damages, payments made by him in the rightful course of administration, upon this ground: that the payments which are thus, as it is termed, recouped in damages, were such as the lawful executor or administrator would have been bound to make; and therefore it cannot be considered as any detriment to him that they were made by an executor de son tort." To the same effect, see 11 Am. & Eng. Enc. Law (2 ed.), 1352.

Mr. Chief Justice LORD, in *Rutherford v. Thompson*, 14 Or. 236 (12 Pac. 382), in discussing the effect of our statute amending the common-law rule, and of the right of an executor de son tort to be credited with payments which he may have made that are tantamount to a due administration of a decedent's estate, says: "The person who intermeddles with the goods of the deceased is now only responsible to answer in an action to the rightful executor or administrator. And whether we consider the intermeddler as an executor de son tort or as a wrongdoer, the liability to respond to the rightful executor or administrator is the same, and unaffected, and the law unchanged. The fiction of office may be gone, but the unauthorized act of intermeddling remains, to be dealt with judicially, according to the principles of right and justice, as applied by the law in such cases. Now, from the fact that the intermeddler with the goods of a deceased is only liable to respond to the rightful executor or administrator for the value of the goods, etc., it by no means follows, if what he did was of benefit, and not injury, to the estate—as the payment of funeral expenses, or debts of the deceased, or

charges such as the rightful representative might have been compelled to pay—he would not be allowed to show the same in mitigation of damages in an action of trover, instituted by such executor or administrator. In thus compelling him to account with only the rightful representative the statute does not purport or undertake to deprive him of any proper or legitimate defense. The title of executor *de son tort* may be repudiated, but the justice of the law will remain, to distinguish between acts which are beneficial and those which are injurious to an estate.” We think Slate had an adequate remedy in the law action instituted by Henkle against him to recoup against the claim for damages caused by his intermeddling all payments made by him that necessarily conduced to the benefit of his mother’s estate.

4. There are some items, however, in his claim, as disclosed by the cross-bill, that could never have been of any advantage thereto. Thus the sum paid to the surety company for responsibility assumed on Slate’s undertaking, and also the appraisers’ and justice’s fees. The sum paid on account of attorney’s fees was no advantage, unless the service rendered was in preserving the property of the estate; certainly not in the ordinary settlement thereof, or in defending in the former suit. The sum of \$100 claimed by Slate should not be allowed, unless his service, like that of his attorneys, was performed in preserving or caring for the property, resulting in a benefit thereto.

5. He is not entitled to any sum whatever as administrator’s fees, and if the county court appointing him had allowed and he had secured the sum prescribed by law as compensation in such cases, as he was only a *de facto* representative of the decedent’s estate the *de jure* administrator could have recovered such fees from him, for the rule is almost universal that an officer *de facto* is liable to

an officer *de jure* for emoluments of office after ouster: Throop, Pub. Officers, §§ 256, 523, 663.

The conclusion reached is not in contravention of the opinion announced in *Oh Chow v. Brockway*, 21 Or. 440 (28 Pac. 384). In that case, the plaintiff's intestate having died in Douglas County under such circumstances as to induce the belief that a crime had been committed, the coroner thereof held an inquest upon the body, which he caused to be buried, having found thereon a certificate of deposit and some money, which he took possession of, and delivered to the county treasurer, who placed it to the credit of the county. The county court of Multnomah County appointed the plaintiff administrator of the decedent's estate, and thereafter the defendant, having been appointed administrator thereof by the county court of Douglas County, received from the county treasurer the money and certificate so found. The defendant having secured the money evidenced by the certificate of deposit, the administrator first appointed commenced an action against him to recover the sums in his possession, which it was alleged he had converted to his own use, the complaint stating that the deceased at the time of his death was an inhabitant of Multnomah County. The answer denied the material allegations of the complaint, and for a further defense stated the facts hereinbefore detailed, and averred that the intestate died an inhabitant of Douglas County, and the coroner, in causing his body to be interred, incurred an expense of \$50.75, which sum was audited and paid by the county, on behalf of which defendant secured the money and the certificate of deposit, and that \$55 of the sum so received had been used by him for the benefit of such estate. A reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a judgment of nonsuit, and the plaintiff appealed. In reversing the judgment, Mr.

Chief Justice STRAHAN, commenting on the payments alleged to have been made for the benefit of the estate, said: "The defendant's statement that he had paid out certain claims, burial expenses, etc., can be of no avail, because he was not authorized to make such payments. The law required Douglas County to pay such funeral expenses, and to deduct the amount from the moneys in the treasury before the county court ordered them paid over to the legal representatives of the deceased person. If it neglected to do what the law plainly required, the defendant is not in a situation to either assert or maintain the claim of Douglas County. It must be remembered that this is a case where the public officials of the county assumed to dispose of the money of a deceased person under and by authority of the statute. In such case all the essential requirements of the statute must be followed, or the rights of the legal representative to the fund will remain unaffected." In that case the statute made it the duty of the county court of Douglas County to deduct from the money deposited with the county treasurer all expenses incurred by the county in holding the inquest and in burying the body, and to pay the remainder to the representative of the deceased: B. & C. Comp. §§ 1697, 1698. Such expenses were not deducted from the amount deposited in the treasury, but the entire sum was delivered to the defendant, and as he had no right, under any circumstance, to any of the money, except the remainder after the payment of the expenses, his payment thereof was illegal, and did not entitle him to recoup the sums paid by him. In the case at bar Slate was interested in the estate of his mother, and therefore not a volunteer, and, as he could have interposed the defense indicated in the law action, an error was committed in overruling the demurrer.

The decree will therefore be reversed, the demurrer sustained, and the cross-bill dismissed. REVERSED.

Argued 18 October, decided 31 October, 1904.

ALLESINA v. LONDON INSURANCE CO.

[78 Pac. 892.]

FIRE INSURANCE — WAIVING CHATTEL MORTGAGE CLAUSE IN POLICY.

The action of an insurance company in issuing and delivering a policy covering certain chattels, on an oral application, and without any statement or inquiry as to the existence or effect of mortgages, and in accepting and retaining the premium, the insured being ignorant that the policy issued contained clause making the policy void if the property insured was mortgaged, amounts to a waiver of the mortgage clause in the policy.

From Multnomah: ARTHUR L. FRAZER, Judge.

Action by John Allesina against the London & Liverpool & Globe Insurance Company on a policy of fire insurance. There was a judgment for plaintiff on a trial before the court, and defendant appeals. **AFFIRMED.**

For appellant there was a brief over the names of *Teal & Minor* and *T. C. Van Ness*.

For respondent there was a brief and an oral argument by *Mr. Henry E. McGinn*.

MR. JUSTICE BEAN delivered the opinion of the court.

This is an action on a policy issued by the defendant to plaintiff on April 28, 1903, insuring against loss or damage by fire to the amount of \$2,000, on his stock of umbrellas, parasols, and the material used in making the same. At the time the contract of insurance was made the property was covered by a chattel mortgage. The policy, however, that defendant issued and delivered to plaintiff, contained a printed clause that it should be void "if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage." This policy was issued upon an oral application, the agent of defendant making no inquiry of plaintiff concerning liens or incumbrances on the property; nor were any statements or representations in reference thereto made by the assured, and he had no knowledge that such information was material, or

45	441
145	630
45	441
146	631

that the policy to be subsequently delivered would contain any provision in reference thereto; or that, if the defendant knew of the mortgage, it would decline the risk. The plaintiff paid, and the defendant received and accepted, the premium, and the property was destroyed by fire during the life of the policy. The only question on this appeal is whether, under these circumstances, the defendant can defeat a recovery on the ground that the policy issued by it and delivered to the plaintiff, and for which he paid, and it accepted and retained his money, was invalid from the beginning because of the mortgage clause.

The decision of this court in *Arthur v. Palatine Ins. Co.* 35 Or. 27 (57 Pac. 62, 76 Am. St. Rep. 450), is admittedly against the defendant's contention, but its soundness is challenged, and we are urged to overrule it. The question involved was examined in the light of the authorities at the time the Arthur Case was decided. The court was then agreed that the rule therein announced is the better one; and, notwithstanding the able and learned argument of counsel for the defendant, it is not now disposed to change its view. The adjudicated cases upon the point are conflicting and irreconcilable: 16 Am. & Eng. Enc. Law (2 ed.), 936. By some courts it is held that the policy of insurance as issued and delivered contains the terms of the contract between the parties, and that force and effect must be given to every clause and provision therein, even though the result may be contrary to the intention of the parties and render the contract void from the beginning. Counsel for the defendant, in support of their contention, cite the following authorities: *Security, etc., Ins. Co. v. Gober*, 50 Ga. 404; *Indiana Ins. Co. v. Pringle*, 21 Ind. App. 559 (52 N. E. 821); *Shaffer v. Milwaukee Ins. Co.* 17 Ind. App. 205 (46 N. E. 557); *Crikclair v. Citizens' Ins. Co.* 168 Ill. 309 (48 N. E. 167, 61 Am. St. Rep. 119); *Dwelling House*

Ins. Co. v. Shaner, 52 Ill. App. 326; *Baldwin v. German Ins. Co.* 105 Iowa, 379 (75 N. W. 326); *Cagle v. Insurance Co.* 78 Mo. App. 215; *Cleaver v. Traders' Ins. Co.* 71 Mich. 414 (39 N. W. 571, 15 Am. St. Rep. 275); *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356 (31 N. E. 31, 28 Am. St. Rep. 645); *Susquehanna Ins. Co. v. Swank*, 102 Pa. 17; *Hayes v. United States Fire Ins. Co.* 132 N. C. 702 (44 S. E. 404); *Ætna Ins. Co. v. Holcomb*, 89 Tex. 404 (34 S. W. 915); *Insurance Co. of North Am. v. Wicker*, 93 Tex. 390 (55 S. W. 740); *Morrison v. Home Ins. Co.* 69 Tex. 353 (6 S. W. 605, 5 Am. St. Rep. 63); *Guinn v. Phoenix Ins. Co.* (Tex. Civ. App.) 31 S. W. 566; *Curlee v. Texas Home Ins. Co.* 31 Tex. Civ. App. 471 (73 S. W. 831); *Tyree v. Virginia F. & M. Ins. Co.* (W. Va.) 46 S. E. 706; *Wilcox v. Continental Ins. Co.* 85 Wis. 193 (55 N. W. 188); *Union Mut. Ins. Co. v. Mowry*, 96 U. S. 544; *Atlas Reduc. Co. v. New Zealand Ins. Co.* (C. C.) 121 Fed. 929; *New York Ins. Co. v. McMaster*, 87 Fed. 63 (30 C. C. A. 552).

Of the citations given, the only ones directly in point are those from Illinois, Wisconsin, Texas, and the 17th Indiana Appellate Court. In the cases cited from Iowa and the 21st Indiana Appellate, the courts were construing policies containing a provision requiring the assured, if the property was incumbered, to report that fact to the company, otherwise the policy should be void; and it was held that a failure of the agent to inquire about incumbrances did not excuse the assured from complying with this clause in the contract. The Illinois Appeal case has reference to the admission of parol evidence to show that, at the time of the insurance, the company's agent consented that the assured might thereafter mortgage the property, notwithstanding the policy contained a stipulation rendering the contract void if the property should become incumbered without the written consent of the company. In the cases from Missouri and North Carolina,

the policies were issued upon written applications which did not disclose an unsatisfied mortgage. The other cases go to the point that an agent of the company, unless authorized to do so, cannot waive a condition of the policy, and that the insured is charged with knowledge of the contents of a policy which has been delivered to and accepted by him. The courts in Nebraska, Kentucky, Montana, Mississippi, and the Indiana Appellate Court have all held that when an insurance company issues a policy covering mortgaged property, without a written application, and, without making any inquiry as to incumbrances, accepts and retains the premium, without any statements or representations being made in reference to incumbrances by the assured, the latter paying the premium and accepting the policy in good faith, not knowing that the incumbrance in any way affects the contract, or that the company intends to insist upon the mortgage clause, the company will be held to have accepted the risk, with the liens and incumbrances thereon, and to that extent have waived or modified the printed terms in the policy: *German Ins. & Sav. Inst. v. Kline*, 44 Neb. 395 (62 N. W. 857); *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743 (67 N. W. 774, 58 Am. St. Rep. 719); *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 624 (39 N. E. 534); *Wright v. Fire Ins. Assoc.* 12 Mont. 474 (31 Pac. 87, 19 L. R. A. 211); *Queen Ins. Co. v. Kline*, 17 Ky. Law Rep. 619 (32 S. W. 214); *Georgia Home Ins. Co. v. Holmes*, 75 Miss. 390 (23 South. 183, 65 Am. St. Rep. 611). The same doctrine has been applied by the courts of New York and Pennsylvania to a different state of facts: *Short v. Home Ins. Co.* 90 N. Y. 16 (43 Am. Rep. 138); *Philadelphia Tool Co. v. British Am. Assur. Co.* 132 Pa. 236 (19 Atl. 77, 19 Am. St. Rep. 596); *Caldwell v. Fire Assoc.* 177 Pa. 492 (35 Atl. 612). The weight of authority, therefore, is not so overwhelmingly either way that a court ought to follow it, regardless of its

own opinion on the question. We feel at liberty to adopt that line of authorities which commends itself to us as supported by the better reason.

A contract of insurance, like any other contract, must, of course, be given force and effect according to its terms as agreed upon by the parties, but provisions in the printed forms, inserted for the benefit of the insurer, may be waived by it in special instances. In determining whether there has been such a waiver, a court should not overlook the fact that insurance policies are prepared by the company for general use, without reference to particular cases, and contain divers and sundry provisions and stipulations concerning different subjects. The contract is not like ordinary contracts between individuals, wherein every clause and stipulation is considered and agreed upon by the parties before the agreement is executed. A policy of insurance is prepared in the office of the company and becomes binding on the assured because it is delivered to and accepted by him. In accepting it he has a right to assume that the company does not intend to insist upon the printed clause therein relating to incumbrances on the property if it makes no inquiry of him concerning the matter, and he has made no statements in reference thereto, and has not been advised that the question was at all material. The preparation and issuance of the policy is the act of the company, and if, in pursuance of a previous agreement to insure, it issues and delivers a policy purporting to cover loss or damage by fire, and accepts and receives the money of the insured, without making any inquiry of him as to incumbrances, or without advising him of the effect on his contract of an incumbrance, it is receiving and accepting his money under circumstances but little short of false pretenses, if the contract is void from the beginning, and never in fact had any force or validity, because of a provision inserted therein by it without the

knowledge of the assured, rendering it void if the property is incumbered. In such a case the company would not only wrongfully receive and accept the money of the insured, but would mislead him into the belief that his property was insured, when in fact it was not, thus deceiving a party honestly seeking and paying for insurance. The consistent and logical result of such a position is that an insurance company may orally negotiate with a property owner to insure his property, and, after investigating the condition of the property so far as it may see fit, agree to issue a policy thereon, without any written application or statement of the assured, relying on its own knowledge of the situation, receive and accept the premium, frame and deliver to the insured a policy which is invalid from its inception, and which in no manner effectuates the purpose which the parties had in view, or which the company promised and agreed to accomplish, and for which it received and accepted the money of the assured. Such a conclusion would be to impute to an insurance company a fraudulent intent to wrong and deceive the insured by issuing and delivering a policy not binding as a contract of insurance, although it received and accepted the premium therefor, knowing that the insured believed the contract valid. We are unwilling to adopt a view which leads to such results and which the facts do not warrant. The judgment is affirmed.

AFFIRMED.

Argued 20 April, decided 1 May, 1908; rehearing denied 28 November, 1904.

WOLF v. CITY RAILWAY COMPANY.

[72 Pac. 329, 78 Pac. 668, 1 St. Ry. Rep. 667.]

WHEN NEGLIGENCE IS QUESTION FOR JURY.

1. Where different inferences may reasonably be deduced from the testimony the question of negligence should be submitted; but not where only one inference can be reasonably deduced. In the latter instance it is the duty of the court to so declare, and the jury may be peremptorily instructed accordingly.

STREET RAILWAYS — DUTY TO LOOK AND LISTEN. .

2. One who fails to look and listen for a car before crossing a public street in daylight at a place where his view is unobstructed is guilty of contributory negligence, and cannot recover even though the street car company may also have been negligent.

ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE.

3. Where one approaching a street railway track stops near by, the motor-man in charge of an approaching car has a right to assume that he intends to wait until the car passes, and is not guilty of negligence in releasing his brakes at the time; but the pedestrian is guilty of negligence if he suddenly starts to cross in front of the car.

IDEM.

4. One who in broad daylight stops beside a street car track till the car approaching, though at an unlawful speed is within a few feet of him, when he attempts to cross in front of it, is guilty of contributory negligence, as matter of law, barring recovery for his injury.

From Multnomah: JOHN B. CLELAND, Judge.

Action by Mollie Wolf, as administratrix of the estate of Isaac Wolf, deceased, against the City & Suburban Railway Company. Defendant appeals from a judgment of \$500 for plaintiff. Two opinions were written in the case, the first by Mr. Justice BEAN, and the one on rehearing by Mr. Chief Justice MOORE. REVERSED.

Statement by MR. JUSTICE BEAN.

On August 26, 1902, Isaac Wolf, while crossing First Street at the intersection of Mill, in the City of Portland, was killed by one of defendant's cars. The plaintiff was appointed administratrix of his estate, and brought this action to recover damages for his death, on the ground that it was caused by the negligence of the defendant. The complaint alleges that there is a steep grade or incline from Montgomery to Mill Street; that at the time of the accident one of defendant's cars was being run down this grade at a reckless, dangerous, and excessive rate of speed, and without any warning being given of its approach to the crossing; that by reason of such negligence, and without any fault on his part, Wolf was struck by the car and killed. The answer denies the negligence alleged, and avers that the defendant's agents and servants were in the

exercise of due care and caution, and that the accident was due to the contributory negligence of Wolf. At the close of the testimony, the defendant requested the court to charge the jury to return a verdict in its favor. This motion was overruled, the jury found a verdict in favor of the plaintiff for \$500, and from the judgment entered thereon this appeal is taken.

For appellant there was a brief over the name of *Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. John M. Gearin*.

For respondent there was a brief over the name of *Bernstein & Cohen*, with an oral argument by *Mr. D. Solis Cohen*.

MR. JUSTICE BEAN delivered the opinion.

The sole question for our determination is whether the court erred in refusing defendant's request to direct a verdict in its favor. The defendant has two parallel tracks, about six feet apart, on First Street, and the deceased was killed by one of its northbound cars on the east track. The evidence for the plaintiff as to the circumstances of the accident consists of the testimony of Joseph Friedman, Joseph Ruvensky, Mrs. Walker, Mrs. Alter, and Mrs. Motts. Friedman, when the accident occurred, was standing on the west side of First Street, about forty or fifty feet north of Mill, and about one hundred feet away. He first saw the car when it was near Montgomery Street, but paid no particular attention to it afterward until he heard some one call out, when he looked up, and saw it strike Wolf. He testified that the car was running at a rapid rate of speed; that he heard no bell rung, or warning given of its approach to the crossing, and first saw the deceased on the track in front of the car just before it struck him. Mrs. Walker and Mrs. Motts were standing on the north side of Mill Street, waiting to take the car to go down town.

They both testified that they saw the car approaching, and that they heard no bell or gong sounded, and that they saw Wolf crossing the street, and did not see him stop, but, on cross-examination, said that the first they saw of him was just before he was struck by the car. Mrs. Alter, who was standing near the door of her place of business, on the east side of First Street, about twenty feet south of its intersection with Mill, stated that she first saw the car about the middle of the block, coming from Montgomery toward Mill Street; that she saw Wolf crossing First Street on Mill, from west to east; that she heard no gong sounded, and the car was coming very fast; that she watched both Wolf and the car until the accident happened; and that Wolf walked straight across the street, without stopping. On cross-examination she testified that she was playing with a child at the time, and calling its attention to the approaching car; that she first saw Wolf coming from the west side of First Street, and did not see him stop until he was run into by the car. Ruvensky was on the west side of First Street, above Mill, going north. He testified that while he was going down the street the car passed him, and that he saw Wolf crossing Mill Street, and he did not stop; that he did not see him when the car struck him because he (witness) was on the other side of the street; that the car was running fast; and that he did not hear the bell or gong sounded. On cross-examination he said that he first saw Wolf when he was on the "first track."

The evidence for the defendant consists of the testimony of passengers aboard the car, and of its operators. C. Grohs was a passenger on the car at the time of the accident, standing on the front platform, at the right of the motorman. He testified that when the car was about the middle of the block between Montgomery and Mill streets

he saw Wolf on Mill; that the motorman immediately rang his bell and slacked up the car; that when Wolf reached the west track he stopped in the middle of it, apparently to let the car go by; that the motorman then loosened up the brake, and the car started ahead, but when it was within seven or eight feet of the crossing Wolf suddenly attempted to pass in front of it, when the motorman again applied the brake, but was unable to stop the car in time to prevent the accident. J. R. Carswell, also a passenger on the car, was standing on the west side of the front platform. He testified that soon after the car passed Montgomery Street he saw Wolf step from the sidewalk to the street, as though to cross to the east side; that the view was unobstructed, and there was nothing to prevent Wolf from seeing the car; that the motorman immediately rang his bell, slowed down the car, and ran within about twelve feet of the crossing, when Wolf stopped on the west track as if to let the car pass, and the motorman loosened the brake and started forward again; that about the same time Wolf started to cross in front of the car, and was struck by it, although the brakes were immediately applied. Joseph S. Bier was standing on the rear step on the west side of the car. He testified that he saw Wolf crossing the street; that the motorman rang his bell and slowed down, and, when the car came near Mill Street, Wolf stopped and looked toward it; that the motorman then loosened the brake and let the car run down to the crossing, but the witness did not see the accident, his view being obscured by the car. Mrs. Gardner and Mrs. Parks were in the car, and both testified that they heard the bell ring, and that the car slowed down; one of them even testifying that it actually stopped before it reached the crossing. B. W. Rose said that he was riding in the car, and that his attention was attracted by the sound of the bell, as it was rung in a quick, sharp

manner, and the car checked up suddenly, but that he did not see Wolf. Frank Keller was standing on the front platform of the car, but did not see Wolf at the time of the accident, because some one was standing in front of him. He testified that the gong was sounded several times, and the speed of the car slackened, before it reached Mill Street, and when it got within about ten feet of the street the motorman suddenly applied the brakes, and about the same time the witness heard some one call out, and then saw Wolf directly in front of the car.

The motorman stated in his testimony that when about the middle of the block between Montgomery and Mill streets he saw Wolf going from the west to the east side of First; that witness immediately commenced ringing the bell and slowing the car down; that he continued to ring the bell and slacken the speed of the car until within about twenty-five or thirty feet of the crossing, when Wolf stopped in the middle of the west track, and the witness, supposing that he was intending to stand there until the car passed by, released the brake, and let the car roll down to the crossing at a speed of three or four miles an hour; that when within about ten feet of the crossing, Wolf suddenly started to pass rapidly in front of the car, when the witness immediately applied the brakes as tight as he could, but was unable to stop the car in time to prevent its striking Wolf; that from the time the car was about twenty or thirty feet from the crossing until it reached a point about eight or ten feet from it Wolf was standing on the west track, and looking toward the car, there being nothing to obstruct his view; that in the middle of the block the car was running at a probable rate of eight or ten miles an hour, but before it reached the crossing it was slowed down to about three miles. The conductor did not see the accident, as he was inside the car, but he testified that he heard the gong, and that the car slowed down to

three or four miles an hour, and that just before it reached the crossing he heard three or four sharp rings of the gong, and felt the car give a jar or lurch, as if the brakes had been suddenly set.

From the testimony on behalf of the defendant the conclusion is irresistible that Wolf saw the approaching car, and first thought that he would stop, and wait for it to go by, but probably concluded that he could safely pass in front of it, and in attempting to do so was struck and killed. And it is practically uncontradicted. All the witnesses for the plaintiff who testified on the subject, unless perhaps it was Mrs. Alter, stated they did not see Wolf until about the time he was struck by the car. Mrs. Alter testified through an interpreter. It is possible to argue from her testimony, as contained in the record, that she intended to say that she saw Wolf all the time after he started across the street until the accident occurred, but the physical conditions were such that it was impossible for her to have had him in view during the entire time. She was on the street south of the crossing, standing between it and the approaching car. She was pointing out the car to the child with whom she was playing, so that her attention must have been more centered on it than on Wolf. It was impossible for her to see both the car and Wolf at the same time, since they were in opposite directions. Again, she was on the east side of the street, and the car must necessarily at some point have passed between her and Wolf, during which time her view was, of course, obstructed. It cannot be said, therefore, that her testimony materially contradicts the evidence for the defendant, or that it alone is sufficient to take the case to the jury, in view of the positive and overwhelming testimony to the contrary of persons whose attention was particularly attracted to the conditions at the time.

1. Where there is a substantial conflict in the testimony, or even where it is undisputed, but different inferences may reasonably be drawn from it, the question of negligence is always for the jury, and the court should not direct a verdict for defendant: *Huber v. Miller*, 41 Or. 103 (68 Pac. 400); *Stager v. Troy Laundry Co.* 41 Or. 141 (68 Pac. 405). But, where there is no substantial conflict, and only one inference can reasonably be deduced from the testimony, the question is one of law for the court, and, in our opinion, this is a case calling for its application.

2. The deceased was crossing a public street, in broad daylight, at a place where his view was unobstructed. It was therefore his duty to look and listen for a car before crossing the track, and, if he did not, he was guilty of such contributory negligence as would preclude recovery (*Smith v. City Railway Co.* 29 Or. 539, 46 Pac. 136, 46 Pac. 780, 5 Am. & Eng. R. Cas. N.S. 163; *McGee v. Consolidated St. Ry. Co.* 102 Mich. 107, 60 N. W. 293, 26 L. R. A. 300, 47 Am. St. Rep. 507; *Ward v. Rochester E. R. Co.* 17 N. Y. Supp. 427; *Watkins v. Union Traction Co.* 194 Pa. 564, 45 Atl. 321), notwithstanding the defendant may have been negligent in running the car at a dangerous rate of speed: *Sego v. Southern Pac. Co.* 137 Cal. 405 (70 Pac. 279).

3. In addition to this, the testimony shows that he saw the approaching car, and stopped when near the track, but afterwards concluded that he had time to pass safely in front of it. When he stopped, the motorman had a right to assume that he intended to wait until the car passed before crossing the track, and was not guilty of negligence in releasing his brakes at the time: *Sanders v. Southern Elec. Ry. Co.* 147 Mo. 411 (48 S. W. 855); *Gray v. Fort Pitt Trac. Co.* 198 Pa. 184 (47 Atl. 945). Under the evidence adduced, therefore, we are of the opinion that the unfortunate accident was not due to the negligence of the defendant, and the judgment must be reversed, and the cause

remanded for such further proceedings as may be deemed proper, not inconsistent with this opinion. REVERSED.

Decided 28 November, 1904.

ON MOTION FOR REHEARING.

MR. CHIEF JUSTICE MOORE delivered the opinion.

4. A petition for a rehearing having been filed, it is contended therein that an error was committed in concluding that the lower court improperly denied defendant's request to direct a verdict in its favor. It is argued that in reversing the judgment, which is based on a verdict, this court reviewed conflicting testimony, and deduced a conclusion from what it considered to be a preponderance, thereby invading the province of the jury. The testimony of plaintiff's witnesses tends to show that the day on which the accident occurred was clear and dry; that the rate of speed prescribed by ordinance for the operation of street cars in the City of Portland was eight miles an hour; that the car causing the injury was heavily loaded with passengers, and running down a steep grade faster than the regulations permitted; that the gong on the car was not struck, nor the speed slackened, until after the injury was inflicted; and that Mr. Wolf, though possessed of good eyesight and hearing, did not halt in crossing the street in front of the approaching car. None of plaintiff's witnesses, except possibly Mrs. Alter, seems to have observed Wolf as he crossed the street until he reached either the west line of rails — the car being on the east track — or until the car had nearly reached the crossing, so that the testimony of defendant's witnesses that he halted in the western double track until the car was nearly opposite him before proceeding on his journey is not contradicted. Joseph Friedman, plaintiff's witness, who beheld the accident, testified that he did not

see Mr. Wolf until one more step would have taken him out of harm's way. Mrs. Alice Walker, a witness for the prosecution, says she first saw Wolf on the west side of First Street, as he was crossing it, but on redirect examination she qualifies this declaration by stating: "I never noticed him until the car hit him there." Mrs. Motts, another witness for the same party, who was standing with Mrs. Walker at the northeast corner of First and Mill streets, waiting for the car, at the time of the accident, in answer to the question, "On what part of the crossing was he [Wolf] when you first saw him?" replied, "I was on the corner, and he came right between the car and me." On cross-examination she stated that when she first saw Wolf he had reached the west track. "Q. And you had not seen him before that? A. No, sir."

Mrs. Eva Alter, who testified by an interpreter, said she was standing south of the southeast corner of Mill and First streets at the time of the accident; that she first saw Wolf as he started to cross the latter street; that he walked without stopping; and that she watched the car and Wolf from the time she saw them until the accident happened. The writer hereof entertained the opinion that the testimony of this witness respecting Wolf's actions immediately preceding the accident was sufficient to dispute the testimony given by defendant's witnesses, and that based thereon the cause was properly submitted to the jury; but the opinion heretofore rendered states that the position occupied by Mrs. Alter was such as to render it physically impossible for her to have seen Wolf all the time he was crossing the street, because the car, after passing her, obstructed her view of him, and the petition for a rehearing, referring to this declaration, admits: "This is undoubtedly true." Accepting such concession as a correct statement of the fact, a review of the testimony given by defendant's witnesses becomes necessary.

G. Grohs, who was standing on the front platform of the car, at the right of the motorman, says that he first saw Mr. Wolf crossing the street, whereupon the gong was struck and the brake applied, causing the speed of the car to slacken; that Wolf stopped in the west track, whereupon the brake was released, and, the car going forward, he jumped in front of it when it was about seven or eight feet from him. On cross-examination, in referring to plaintiff's husband, the witness was asked, "When he stopped, how far was the car from him at that time?" and answered: "I guess about fifty feet. Q. What was Mr. Wolf doing during the time the car was running that forty feet? A. He just made a stop there." The testimony of this witness is corroborated by that of C. F. Lawson, the motorman in charge of the car, and also by that of J. R. Carswell, a passenger thereon at the time of the accident. Joseph S. Bier, another passenger, in speaking of Wolf as he halted in the west track, testified as follows: "He looked right at the car." Lawson, in referring to Wolf at the time the brake was applied, says: "When I stopped he looked up towards the car." This witness, in answer to the question, "Was there anything between the car and him to obstruct his vision?" replied, "There was nothing to obstruct his view at all." Carswell, who saw plaintiff's husband on the track, was asked, "Was there anything to obstruct your view of Wolf?" and answered, "Nothing." A fair analysis of the testimony shows that there is no controversy or dispute in relation to Wolf's having stopped on the west line of rails, and remained in that position until the car had reached a line about ten feet south of him, when, suddenly trying to cross in front of it, he sustained an injury which caused his death.

Though the witnesses for the respective parties disagree in their testimony in several material matters, the plaintiff's right of action depends on the consideration of a

single question — whether or not her husband's proximity to the car when he attempted to cross in front of it affords such evidence of contributory negligence that the trial court could say, as a matter of law, that it precluded a recovery of the damages sustained in consequence of the injury inflicted. In discussing this subject it will be assumed that the testimony given by plaintiff's witnesses and the inferences deducible therefrom are true, and tend to show that at the time of the accident the car was running at a prohibited rate of speed, and that the gong was not sounded. Wolf was attempting to cross a public street on a walk provided for that purpose, and had a right to pursue his journey on the line selected. If a pedestrian could not legally cross a line of rails in a populous city in front of a street car, his travel on the public thoroughfares occupied by street railways would necessarily be limited to a few hours at night, when cars cease running, for in the daytime they constantly follow each other in rapid succession, and any crossing of the street would necessarily be in front of a car. So, too, a street car company, having secured a franchise, has a lawful right to propel cars along its tracks, and is not compelled to desist therefrom because some public crossing on its lines may be occupied by pedestrians, for, if the converse were true, no street car could be operated except when inclemency of weather or darkness suspended such travel, thereby rendering the operation of street cars unprofitable and of no use to the public. Travelers on foot and in carriages, as well as street car companies, have equal and reciprocal rights in and to the use of public streets, and neither can deprive the other of the enjoyment thereof. Because a person is authorized to cross a street car track, the exercise of such right will not justify his attempting to do so in front of an approaching car, when danger therefrom may reasonably be apprehended. The rights of travelers

and of street cars to use public streets being commensurate, and the degree of responsibility of each measured by the facility with which their respective movements may be controlled, the crossing of a line of rails by a person *sui juris* will not constitute contributory negligence unless the proximity of an approaching car would have warned an ordinarily prudent mind of the impending danger: *Campbell v. Los Angeles Trac. Co.* 137 Cal. 565 (70 Pac. 624). In that case Mr. Justice McFARLAND, in speaking of the duty of a person attempting to cross the track of a street railway in front of a car, says: "Of course, in a case like this there may be undisputed facts from which the legal conclusion of contributory negligence necessarily follows, and this may be so when the collision happens on a street railroad. But, as has been frequently held by this court, the same character of care is not demanded of one crossing a street railroad where cars are frequently passing at a slow rate of speed and can be easily controlled as is demanded of one crossing an ordinary steam railroad running through the country, on which heavy trains, difficult to control, go at stated times with great speed. With respect to a street railroad, the mere fact that a person attempts to cross it when a car is seen to be approaching does not of itself constitute contributory negligence. Of course, one in close proximity to an approaching street car might walk or drive in front of it so suddenly as to clearly be guilty of contributory negligence; but ordinarily, whether or not he was negligent in attempting to cross, under the circumstances of the case, is a question for the jury."

In the case at bar we think the undisputed testimony shows that, though it be admitted that the car was running at a prohibited rate of speed, and that no bell was rung as the crossing was approached, the deceased, having seen the car, attempted to cross in front of it, and in such

proximity thereto that his act conclusively shows such contributory negligence that the trial court should, as a matter of law, have told the jury that plaintiff could not recover for the injury sustained, and hence we are compelled to adhere to the former opinion. It is possible, however, that plaintiff may hereafter be able to prove that when her husband attempted to cross the track the car was farther away than is indicated by the testimony of defendant's witnesses, and what has been here said is not intended to preclude another trial. The petition for a rehearing must be denied, and it is so ordered.

REVERSED: REHEARING DENIED.

Argued 12 October, decided 31 October, 1904; rehearing denied 15 May, 1905.

KROLL v. COACH.

[78 Pac. 397, 80 Pac. 900.]

EFFECT OF EVIDENCE OF JOINT PURCHASE.

1. Evidence in a suit to have defendant declared a trustee for plaintiffs to the extent of a certain interest in land held sufficient to sustain a finding that plaintiffs were joint purchasers with defendant, under an option obtained by him, of said land, and not purchasers directly from him of an interest therein.

EFFECT OF FRAUD BY A JOINT PURCHASER ON THE OTHERS.

2. A person having exclusive information relative to a proposed purchase, offering others an opportunity to take an interest and share the anticipated advantages on equal terms with him, is bound to act with entire truthfulness and good faith toward them in the matter, and if he derives a personal gain by deceiving them he is accountable as a trustee *ex maleficio*.

EQUITY JURISDICTION — PROCEEDS OF TRUST FUNDS.

3. Where the holder of an option of purchase induces others to join with him on a representation that for specified proportions of the price they shall have corresponding interests in the property, but fraudulently misstates the price so that the other purchasers are deceived and do not really get the proportions that they paid for, the difference going to the optioner, such purchasers may either sue for damages at law or have an equitable decree for the conveyance of the interest that they really bought.

TRUST EX MALEFICIO — STATUTE OF FRAUDS.

4. The enforcement of a trust arising *ex maleficio* is not dependent upon a memorandum, nor is it at all affected by the statute of frauds.

WRITINGS NOT CONCLUSIVE BETWEEN PARTIES IN CASES OF FRAUD.

5. In a suit to compel restitution of property fraudulently withheld by an agent or trustee, a deed between the parties is not conclusive, it being part of the scheme by which the principal was deceived.

From Douglas: JAMES W. HAMILTON, Judge.

Suit by William Kroll and another against William Coach in which there was a decree for plaintiffs. Defendant appeals.

AFFIRMED.

For appellant there was an oral argument by *Mr. Edward B. Watson* and *Mr. Andrew M. Crawford*, with a brief over the name of *Watson, Beekman & Watson*, to this effect.

I. Courts of equity in this country have no concurrent jurisdiction in cases of fraud where the remedy at law is adequate and complete: Story, Eq. Jur. §§ 49, 61, 62; 2 Pomeroy, Jur. §§ 912-914; *Dows v. Chicago*, 78 U. S. (11 Wall.) 108-110; *Grand Chute v. Winegor*, 82 U. S. (15 Wall.) 373-377; *Teft v. Stewart*, 31 Mich. 367-378.

And such is the rule in this State both under the statute and decisions of the supreme court: 1 Hill's Ann. Laws, § 380; *Ming Yue v. Coos Bay R. Co.* 24 Or. 392-394 (33 Pac. 641); *Fleischner v. Citizens' Invest. Co.* 25 Or. 119 (35 Pac. 174); *Oregon & Cal. R. Co. v. Jackson County*, 38 Or. 589, 597-599 (64 Pac. 307, 22 Am. & Eng. R. R. Cas. 98).

II. A parol agreement between parties that one shall act as the agent of the other, or of both jointly, in the purchase of lands is within the statute of frauds: 1 Hill's Ann. Laws, § 781; 2 Story, Eq. Jur. (12 ed.), § 1201a; 1 Perry, Trusts (3 ed.), § 134; *Botsford v. Burr*, 2 Johns. Ch. *406, 408; *Green v. Groves*, 109 Ind. 519 (10 N. E. 401-405); *Monson v. Hutchin*, 194 Ill. 431 (62 N. E. 788); *Chenoweth v. Lewis*, 9 Or. 150-152.

III. All previous and contemporaneous negotiations and agreements merge in the deed of conveyance made in consummation thereof, and which thereby becomes the executed contract of sale and purchase, and conclusive evidence that the transaction was a sale and purchase,

and the relation of the parties that of sellers and purchasers: *Williams v. Hathaway*, 19 Pick. 387-389; *Howes v. Barker*, 3 Johns. *506-511 (3 Am. Dec. 526); *Hunt v. Amidon*, 4 Hill, 345 (40 Am. Dec. 283); *Slocum v. Bracy*, 55 Minn. 249 (56 N. W. 826, 43 Am. St. Rep. 499); *Clifton v. Jackson Iron Co.* 74 Mich. 183 (41 N. W. 891, 16 Am. St. Rep. 621-624); *Davis v. Clark*, 47 N. J. L. 338 (1 Atl. 239); *Jones v. Wood*, 16 Pa. St. 25; *Carter v. Beck*, 40 Ala. 599; *Timens v. Shannon*, 19 Md. 296 (81 Am. Dec. 632); *Bryan v. Swain*, 56 Cal. 616; *Davenport v. Whistler*, 46 Iowa, 287; *Gibson v. Risehart*, 83 Ind. 313-315.

IV. There is no resulting or constructive trust in any case, unless the amount paid is intended to be the purchase part of the whole, or of an aliquot part of the property: 1 Perry, Trusts (3 ed.), § 132; *McGowan v. McGowan*, 14 Gray, 119-122 (74 Am. Dec. 668); *White v. Carpenter*, 2 Paige Ch. 217, 240; *Skehill v. Abbott*, 184 Mass. 145 (68 N. E. 37); *Kaphan v. Toney*, 58 S. W. 909, 913.

V. False representations as to the price paid for property, inducing the purchase thereof by another, afford ground for rescission only, and no other relief: Cook, Stockholders, § 145; *Valton v. National Fund Life Assur. Co.* 20 N. Y. 32, 37; *Coles v. Kennedy*, 81 Iowa, 360 (46 N. W. 1088, 25 Am. St. Rep. 503); *McLaren v. Cochran*, 44 Minn. 225 (46 N. W. 408, 20 Am. St. Rep. 566, 9 L. R. A. 263.)

For respondents there was an oral argument by *Mr. Wirt Minor*, with a brief over the name of *Teal & Minor*, to this effect.

1. At the time of the agreement between the parties, the lands had not been purchased by the defendant, and in making the purchase the defendant acted as agent and trustee for the respondents as well as upon his own behalf: Story, Agency, § 3; *King v. Wise*, 43 Cal. 628;

Hewitt v. Young, 82 Iowa, 224; *Duryea v. Vosburg*, 138 N. Y. 621; *Crump v. Ingersoll*, 44 Minn. 84; *McNutt v. Dix*, 83 Mich. 328; *Wright v. Smith*, 23 N. J. Eq. 106; *Ellsworth v. Pomeroy*, 26 Ind. 158; *Willink v. Vanderveer*, 1 Barb. 599; *Wright v. Calhoun*, 19 Tex. 412; *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Cotton v. Halliday*, 59 Ill. 176; *Rose v. Hayden*, 35 Kan. 106 (57 Am. Rep. 145).

2. The relation of principal and agent is a fiduciary one and the rules of law governing other fiduciary relations govern also the relation of principal and agent: Perry, Trusts, §§ 173, 206; 1 Beach, Trusts, §§ 106, 192, 193; *Eldridge v. Jenkins*, 1 Story, 181.

3. The defendant acted as the agent of the plaintiffs as well as for himself in consummating the purchase of the lands. He, therefore, could not himself become the seller or make a profit out of his principals, or out of the transaction which he conducted for them even if such profit be collateral: *Willink v. Vanderveer*, 1 Barb. 599; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Moon v. Moon*, 5 N. Y. 262; *Gardner v. Ogden*, 22 N. Y. 347; *Conkey v. Bond*, 36 N. Y. 427; *Duryea v. Vosburg*, 138 N. Y. 621; *Flagg v. Mann*, 2 Sumner, 521; *Michaud v. Girod*, 45 U. S. (4 How.) 503; *King v. Wise*, 43 Cal. 62; *Cook v. Woolen Mill Co.* 43 Wis. 433; *Northern Pac. R. Co. v. Kindred*, 14 Fed. 77; 1 Beach, Trusts, §§ 92, 192; Perry, Trusts, § 206; Story, Agency, §§ 210, 211; Kerr, Fraud, 173, 174.

4. In all contracts of an agent with his principal, if the agent has information and does not disclose the same to his principal, this is a fraudulent concealment, and the contract may be avoided, or the agent held to be a constructive trustee: Perry, Trusts, §§ 178, 206, 209; *Farman v. Brooks*, 9 Pick. 212; *Hendricks v. Nunn*, 46 Tex. 141; *King v. Wise*, 43 Cal. 628; *Newell v. Holbridge*, 41 Minn. 378; *Willink v. Vanderveer*, 1 Barb. 599; *Wright v. Smith*, 23 N. J. Eq. 106.

5. Notwithstanding the doctrine laid down by the Supreme Court of Massachusetts in *McGowan v. McGowan*, 14 Gray, 119, the courts of many other states have held that a trust, even in the absence of fraud or of unconscionable conduct, results to the parties furnishing the consideration to the extent to which they may have furnished the consideration for the purchase: *Pinney v. Fellows*, 15 Vt. 525; *Purdy v. Purdy*, 3 Md. Ch. 547; *Cecil Bank v. Snively*, 23 Md. 261; *Buck v. Swasey*, 35 Me. 41 (56 Am. Dec. 681); *Case v. Coddington*, 38 Cal. 191.

MR. JUSTICE WOLVERTON delivered the opinion.

1. This is virtually a suit to have the defendant declared a trustee for plaintiffs to the extent of three sixteenths undivided interest in 9,716.67 acres of timbered land in Coos County, Oregon, to the undivided fourth of which tract defendant holds the legal title. Some time prior to June 17, 1902, the defendant procured an option to purchase the land from the original owners, who, in pursuance thereof, deposited their deeds of grant to him in escrow with the First National Bank of Portland, Oregon, the same to be delivered to him upon condition of his paying to the bank for the owners the agreed price at which defendant held the option. Being so circumstanced, he represented to plaintiffs—more particularly to Kroll, the principal actor in behalf of plaintiffs—that he had secured an option on about 10,000 acres of land at ten dollars per acre, which was the price he was to pay the owners, and that it could not be purchased for less; that the deal had been held up for several months on account of another option having been secured in the mean time upon a part of the tract; that he had previously interested some people in Houghton, Michigan, in the matter, and that they decided it would be well to have the deeds all made to one party and sent to the Houghton bank for

payment, when such party could deed to the others whatever interest they took, or he could deed direct to a company should they organize one; that he was compelled to await the expiration of the intervening option, but that latterly, finding it had expired, he had wired his agent in Oregon to close the deal, have the deeds made to him, and send them on to the bank at Houghton for payment, and that he was then ready to close the matter up, and proposed to plaintiffs that they take an interest with him in the purchase, as they, being lumbermen, would relieve him of some responsibility in arranging the matter; that he would take a fourth interest himself, and pay the purchase price therefor, and that they would get their interest at the same figure per acre as he would obtain his; that there would be no commission or bonus to himself or any one else; that all he would require was that they should share with him, according to their interest, in his traveling expenses and the expense of examining the lands, which would fall below \$1,000, and also that they should pay in the same proportion a fee of \$500 he had agreed to pay his attorney, Mr. Crawford, for examining the title; whereupon plaintiffs agreed to take a three-fourths interest jointly with him, Sparrow taking a one-half interest and Kroll a fourth, upon the terms proposed, the several parties to pay the purchase price in proportion to their respective interests, plaintiffs to reimburse defendant for the expenses he incurred and pay the fee for examining the title in like proportion.

This exposition of the understanding or agreement is amply supported by the testimony of Kroll, which is substantially corroborated by that of Sparrow, Rice, Messner, and Arthur H., son of William Kroll. Kroll testifies, in substance, that Coach told him he had talked with Sparrow about the land, who said to let witness know about it when he got in shape to purchase, and hence he had wired

witness; that Coach then stated that he would like Sparrow and witness to join in the purchase, as they were lumbermen, and would take some responsibility off of him in arranging the matter; and that he had bought the lands directly from the owners, and not through an agent or commission man; that he further said to the witness: "Now, Kroll, if you and Sparrow want to join me in this purchase, I will let you in on the ground floor. The purchase price of the property is ten dollars per acre, and you can have an interest at that price and I will take one fourth myself. Whoever joins me will get their interest at the same price I get mine, and we will all fare alike"; that he further said to witness that there was no commission or bonus to himself or anybody else; that he had not added anything to the price of the land to cover his personal expenses, and that those joining him could jointly reimburse him according to their interests; that he might not be able to get the deeds sent to Michigan for payment, as one fellow had refused to let his go; that he had the matter up by wire, and that, if the deeds did not arrive soon, he would have to go to Oregon again, and wanted to know how soon witness could give him an answer. Kroll further testifies that he went to Lansing, Michigan, saw Sparrow, and on June 20th wired Coach: "Have arranged for three quarters interest if satisfactory. Can go West with you early next week"; to which Coach replied: "All right. Try to arrange to go as soon as possible"; that when witness next saw Coach he told him he would take a fourth interest and Sparrow one half, and witness would go to Oregon with him, he having stated that the deed had not arrived; that Coach said he would take one fourth interest himself.

The witness continues that, having concluded to go to Oregon, Coach said he would buy a draft for \$25,000 to

pay for his interest, and advised witness to do the same; that witness bought a draft on New York for \$25,000, started for Oregon on the 25th of June, met Coach in Duluth on the 26th, and both arrived in Portland on the 29th; that on their arrival they were informed that the deeds to Coach were in the First National Bank of that city; that witness examined the abstract, and was informed by Coach that the purchase had to be closed on that or the following day; that witness requested a week's extension of time in which to examine the land, but that Coach refused to give it; that on July 1st, having finished examining the abstracts, they went in the afternoon to the bank, and that witness there paid over to Coach, by draft on New York, \$50,000, to pay for Sparrow's one-half interest, and \$25,000 for his fourth interest; that a little later the deed for his and Sparrow's respective interests, executed by Coach, was handed to him, together with a rebate on the amount paid, intending to reduce the price of the tract to correspond with the exact number of acres covered by the deed, being less than 10,000, at ten dollars per acre, the amount retained being \$48,148.80 of Sparrow's draft and \$24,074.40 of witness' draft; that subsequently it was ascertained that 85.97 acres had been omitted from the estimate, three fourths of the value of which at ten dollars per acre witness agreed to pay to Mr. Crawford, and which was subsequently paid through the firm of Cotton, Teal & Minor, of Portland, being \$429.85 in Sparrow's behalf and \$214.93 in his own; that within a week, and before making the payment to Crawford, witness ascertained that Coach had paid not to exceed eight dollars per acre for the land in question; that before finally closing the arrangement Coach stated to witness in Portland, Oregon, that there was to be no bonus or commission to himself or any one else, and that, if witness and Sparrow paid their money, they would get their interest at the same

price per acre that he got his; that Coach said he was sure the land could not be purchased for less than ten dollars an acre, and that the final agreement was that plaintiffs should purchase jointly with Coach, who should take a quarter interest, Sparrow a half interest, and witness a quarter, and that they should own the land jointly; that it was further understood that they should pay Mr. Crawford \$500 for his services in examining the title, which was subsequently done. It is also shown that plaintiffs relied upon Coach's representations as to the purchase price he was to pay for the land, and were deceived and misled thereby.

The defendant strenuously controverts this testimony and the foregoing rendition of the agreement in all essential particulars, and claims that he sold three fourths interest in this land directly to Kroll and Sparrow at ten dollars per acre, the sale having no reference to the price he was paying the holders. In this view he is corroborated but slightly, no one but himself pretending to testify to the terms of such an arrangement between him and Kroll as finally concluded. He admits, however, that the real price he agreed to pay the original holders for the land was concealed from plaintiffs, nor were they able to ascertain the truth about it until Kroll went in person to some of the vendors, receiving either misleading or evasive answers to all inquiries he made of defendant or those acting for him. The deed executed by defendant to plaintiffs was in form a warranty, Kroll refusing a quitclaim; but plaintiffs' money was used to pay for part of the interest that defendant obtained, he paying the balance. This is as far as it is necessary to take note of the testimony adduced, its trend being fairly indicated by the résumé given, and its cumulative effect constrains us to the view that plaintiffs' evidence is by a strong preponderance entitled to the greater weight. The first and most

vital question presented, namely, whether plaintiffs were purchasers from defendant, or the three were purchasers from the original holders, the defendant acting as the agent of plaintiffs in the transaction, is therefore solved in favor of the latter position.

The defendant had not the legal title to the land, or any part of it, before the consideration was paid to the original holders. The deeds running to him were deposited in escrow awaiting the payment of the consideration before their delivery, and it is well understood that such deeds did not become effective to convey the title until the condition upon which they were deposited was fulfilled. Defendant simply had what he aptly characterized as an option to purchase, and, having secured it, he dealt with plaintiffs as though they were purchasing with him under the option, the three to become joint purchasers of the property for the consideration that he represented he was paying to the holders; in other words, using his expressive language, plaintiffs were to be "let in on the ground floor"—that is, were to come into the purchase upon the same terms and conditions that he had made with the holders—with the further proviso, only, that they were to reimburse him according to their proportion for his expenses incurred in traveling and examining the property and the fee that he agreed to pay to Mr. Crawford for examining the title. It is palpably inconsistent with this understanding that plaintiffs should pay more for the lands than the defendant was to pay the original holders therefor under his option, for, if they did, they would not secure the same advantages to which he was entitled. Their interests, therefore, would cost them more than the defendant's interest would cost him. The defendant, without doubt, not only concealed from plaintiffs the real purchase price, but purposely misrepresented to them that he was paying to the holders ten dollars per acre, this

seeming necessary to him in order to induce plaintiffs to join with him in the purchase under his option. This was a fraud upon the plaintiffs. Fair dealing suggests that, if they were to have all the advantages of a purchase under his option, defendant should have fully disclosed to them the real purchase price, and the fact that he concealed and misrepresented it to them affords convincing proof of plaintiffs' theory as to the agreement between them and the defendant, viz., that they were to be let in under defendant's agreement with the original holders.

The decree of the trial court directed that plaintiffs pay to defendant \$500 to reimburse him for his expenses and the outlay incident to the purchase of the property, and, upon such payment being made, that defendant convey to plaintiff Sparrow one eighth and to Kroll one sixteenth interest in the entire tract; otherwise that the decree stand as and for such conveyance. It will be noted that the amount actually paid as indicated by the testimony does not equal the purchase price of a fifteen-sixteenths interest of the tract at eight dollars per acre, but it was so intended, and for all practical purposes it stands in that proportion to the whole; the difference being seven dollars and some odd cents, which must be attributed to an error in calculation. It is to reverse this decree that the appeal is prosecuted.

2. In the legal aspect of the case, the defendant assumed a relation of trust and confidence toward plaintiffs. His position was such that he had exclusive knowledge of subsisting conditions affecting the venture that he proposed, and the plaintiffs were dependent entirely upon his representations, and relied upon them. In effect, he acted as their agent, as well as for himself, in negotiating and consummating the purchase from the original holders of the land to which they subsequently acquired the title in their own right. Such a relation enjoined upon the de-

fendant absolute good faith toward the plaintiffs, and he was in duty bound, in law as well as in ethics, to disclose to his principals all the knowledge attending the transaction that he possessed. If he had been dealing with them at arm's length, as his theory of the case would imply—that is, if he had been selling to them, instead of buying for them—the duty would have been otherwise. But he was not. He occupied the position of negotiating a joint purchase for the three, including the plaintiffs and himself, and plaintiffs were entitled to all the advantages jointly with him that he contracted for under his option with the original holders. According to his representations, they were securing all such advantages in the exact proportion that he was securing them, and, acting upon such representations, the purchase was consummated. It developed later, however, that he knowingly misled them as to a material fact in the transaction—one that would have influenced them to act differently, in all probability, if they had known of the true condition. The act was in palpable fraud of the plaintiffs' rights, and, as defendant thus secured an advantage he could not otherwise have obtained, he has through deception possessed himself of the plaintiffs' money to the extent of two dollars per acre for three fourths of the tract, which he applied toward the purchase of his own undivided one fourth interest, and in this he must be held to the accountability of a trustee *ex maleficio*. The authorities are ample in support of this view: *Wright v. Smith*, 23 N. J. Eq. 106; *McNutt v. Dix*, 83 Mich. 328 (47 N. W. 212, 10 L. R. A. 660); *King v. Wise*, 43 Cal. 628; *Willink v. Vanderveer*, 1 Barb. 599.

Agency is a fiduciary relation, which is one of trust and confidence, and "the same observations apply," says Mr. Perry in his work on Trusts (vol. 1, 4 ed., § 206), "as to other relations of trust and confidence." He further observes: "No person whose duty to another is inconsistent

with taking an absolute title to himself will be permitted to purchase for himself, for no one can hold a benefit acquired by fraud or a breach of his duty. All the knowledge of the agent belongs to the principal for whom he acts, and, if the agent use it for his own benefit, he will become a trustee for his principal." With reference to the same subject Mr. Beach says: "This is a fiduciary relation, and the principles of equity by which the relation of a trustee to his beneficiary is governed apply to the relation of an agent to his principal. It is well settled that any person sustaining a fiduciary relation toward another in regard to property is bound to make use of all the knowledge, to improve all the opportunities, to exercise all the powers and rights of every description that he has derived from his fiduciary position, or has acquired by means of it, for the benefit of his *cestui que trust*. And on the same principle he may not avail himself of these advantages to promote his own interest. The rule is inflexible that in every case in which a person is either actively or constructively an agent for others, all the profits and emoluments secured by him in the business inure to the benefit of the employer": 1 Beach, Trusts & Trustees, § 192. As to the liability of an agent to account, and the extent to which he is required to render up his gains and the emoluments secured through the relationship, the court say in *Northern Pac. R. Co. v. Kindred*, (C. C.) 14 Fed. 77, 80: "If an agent shall make any profits in the course of his agency by any concealed arrangement, either in buying or selling, or other transactions on account of the principal, such profits shall belong exclusively to the latter." To the like effect is the language of Mr. Mechem. He says: "It may be stated as a general rule that the agent is bound to account to his principal for all money and property which may come into his hands during and by virtue of the agency. This rule embraces not only

such money and property as may be received directly from the principal, but also that which comes into the agent's hands as the result of his agency. As has been seen in a previous section, to the principal belong all profits and advantages made by the agent beyond lawful compensation, whether such profit or advantage be the fruit of the performance or the violation of the agent's duty, or whether they are the result of transactions within or beyond the scope of his authority, provided the acts from which they accrue were assumed to be done in the behalf and for the benefit of the principal": Mechem, Agency, § 522. The defendant's position, therefore, being one of trust and confidence in his relation to plaintiffs with reference to the transaction under consideration, he can make no profit from his bad faith in deceiving and misleading the plaintiffs, and thus acquiring and investing their funds, as to which, or the proceeds arising therefrom, the law charges him as trustee by construction arising *ex maleficio*.

Nor can he be permitted to enjoy the benefits thus acquired which belong to his principals, and a court of equity will adjust them accordingly. Mr. Pomeroy says: "In general, wherever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, * * or through any other similar means, or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal interest therein. * * The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice,

although the law may also give the remedy of damages against the wrongdoer": 2 Pomeroy, Eq. Jur. (2 ed.), § 1053. So, with Mr. Perry: "If a person obtains the legal title to property by such arts or acts or circumstances of circumvention, imposition, or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances or relations; and this trust they will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it or to execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and interests of society. Such trusts are called constructive trusts. They differ from other trusts in that they are not within the intention or contemplation of the parties at the time the contract is made from which they are construed by the court, but are thrust upon a party contrary to his intention and against his consent": 1 Perry, Trusts (4 ed.), § 166. "In such cases," says Mr. Bispham, "the interference of courts of equity is called into play by fraud as a distinct head of jurisdiction; and the complainant's right to relief is based upon that ground, the defendant being treated as a trustee merely for the purpose of working out the equity of the complainant": Bispham, Equity (4 ed.), § 91. The doctrine is well settled, and is enunciated by this court in *Parrish v. Parrish*, 33 Or. 486 (54 Pac. 352). From these principles it follows irresistibly that the trial court was right when it charged the defendant, as a trustee for the plaintiffs, with an undivided three sixteenths of the tract,

or three fourths of the fourth interest to which he took the title in his own name.

3. At the risk of a possible restatement of the case in part, we may say the transaction amounts to this: Upon the defendant's representations, plaintiffs purchased, investing in these lands to the extent of a three-fourths interest; but in reality, taking into account the actual value paid for them, they invested to the extent of a fifteen-sixteenths of the whole. In other words, instead of purchasing with plaintiffs' money a three-fourths interest, defendant purchased a fifteen-sixteenths interest, and took the title to a three-sixteenths in his own name. Thus the defendant has secured a benefit accruing to himself with the funds of plaintiffs, and being so secured through his own *mala fides* he ought not to be permitted to retain it. To put the case in a clearer light: Suppose defendant had represented to plaintiffs that for the sum obtained he could purchase for them a distinct tract of land, say, 750 acres, but that in reality he purchased with the money another tract, consisting of 187½ acres, taking the title to this latter in his own name, would it be contended that defendant could retain the fruits of his own misrepresentation, although plaintiffs had obtained what they were led to believe and actually thought they were getting? That the parties were dealing with undivided and not segregated interests can make no practical difference as to the legal effect of the transaction. In either event defendant has procured something with plaintiff's money that he is not entitled to have or retain, and it is distorted logic to say that the plaintiffs are entitled to damages, but not to the land which their money has purchased. If the land were worth much less than the purchase price, defendant might be contending that the land, and not damages, was the only relief to which they were entitled. But, legally, they are entitled to either remedy, according to their own choos-

ing. Defendant came by their money fraudulently, and has invested it in property. Plaintiffs may now either ratify the purchase and accept the property, or recover damages for the defendant's fraudulent practices whereby he obtained their funds. This solves also the question made by defendant that plaintiffs are without relief in equity because they have an adequate remedy at law. The defendant has fraudulently procured and misappropriated funds of plaintiffs, which plaintiffs may follow into whatsoever form they may have assumed, and recover them in their changed and transformed condition. This, together with the fact of fraud, or the *mala fides* of the fiduciary, accords to equity concurrent, if not exclusive, jurisdiction in the premises for their relief.

4. Nor can the objection avail the defendant that the amount paid by plaintiffs in its purchasing value is not resolvable into an aliquot part of the tract of land purchased, as, according to the intention of the parties in making the estimate of payments, it is, on the contrary, exactly so resolvable. The simple demonstration is that three fourths of the tract at ten dollars per acre equals fifteen sixteenths of the tract at eight dollars per acre, and this is what the money advanced to defendant paid for. In further support of these principles, see *Barger v. Barger*, 30 Or. 268 (47 Pac. 702). Furthermore, the case is not within the statute of frauds, arising, as it does, *ex maleficio*, requiring some note or memorandum of the transaction to be in writing: *Parrish v. Parrish*, 33 Or. 486 (54 Pac. 352).

Another question urged is that plaintiffs are estopped to insist upon their equities on the ground that they paid to defendant part of the purchase price after they discovered the fraud. The fact is, as the testimony shows, that plaintiffs paid the whole of the purchase price by checks in the first instance, and by mistake in estimate more

money was returned to plaintiffs than they were entitled to. Upon discovery of this mistake Kroll agreed to repay the deficit to Mr. Crawford, and under this arrangement the subsequent payments spoken of were made. Such subsequent payments, it seems to us, were not tantamount to a ratification of the fraud perpetrated by defendant upon plaintiffs. The original agreement had been fully consummated, and what remained to be done was merely incident to the mistake of the parties in making the estimate; the final promise to Mr. Crawford being for the benefit of the owners, and not of the defendant. Having fulfilled this promise, it could not, from any conceivable equitable consideration, operate to estop plaintiffs from insisting upon their rights as against defendant.

Again, it is insisted that the insistence upon and acceptance of a warranty deed by plaintiffs from defendant concluded the parties as to the respective interests in the land to which they were entitled. It must be understood, however, that this deed was executed and accepted under the shadow of defendant's fraudulent representations; hence the form of the conveyance could have no weight in determining the rights of the parties, except that it afforded an incident, possibly, to show that plaintiffs were purchasers direct from defendant. But this, we are satisfied, was not the case. The defendant was to receive warranties from the owners, and, to make the chain of title uniform, plaintiffs required a warranty also. Virtually, this is all there is in the incident, and has no preclusive bearing in the case as to either party.

Having disposed of all the questions presented favorably to the respondents, the decree of the court below will be affirmed, and such will be the order of this court.

AFFIRMED.

Decided 15 May, 1905.

ON MOTION FOR REHEARING.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

5. The appellant, by his petition for rehearing, strenuously insists that the entire arrangement or contract subsisting between the parties touching the land, the subject of the purchase, was merged in the warranty deed executed by Coach and delivered to Kroll and Sparrow, and that henceforth the latter were precluded from setting up any other contractual relations than such as the deed witnesses. The rule suggested that all previous and contemporary negotiations and agreements concerning the sale and purchase of land merge in the deed of conveyance, so that it becomes an express, entire, and final contract between the parties, may be conceded, but it is difficult to understand that it can have the least application to the case at bar. Of course, the fact that the deed was made was pertinent and strong evidence that the parties were dealing concerning the land in proportions as indicated by its terms; but it cannot stand as the final and conclusive contract between them, so as to exclude or preclude any other condition that the law might entail, where the transaction from the beginning is attacked for fraud, and it is made to appear that the grantees were induced to accept the conveyance through the deceit and fraudulent intrigue of the grantor. Thus, it was the theory of plaintiffs that, while the deed conveyed to them all the land they bargained for, yet it did not convey all that their money paid for, and consequently all that they were entitled to, looking throughout the transaction, and considering the relations the parties sustained to each other, and the method adopted by which the defendant procured the money of plaintiffs with which to complete the purchase.

The scheme was one calculated to mislead and defraud the plaintiffs, and we found, after a very careful scrutiny of the testimony, that such was its legal effect, and that defendant purchased more land with their money than they obtained a deed for, and that he ought to render up to them the overplus, having become trustee thereof *ex maleficio* for their use. Now, to say that the deed concludes the plaintiffs absolutely, as against the fraudulent intrigue of the defendant, when accepted and received without knowledge of the fraud, is to preclude them from any judicial inquiry into the matter whatever, and to send them away remediless. The deed is no more effective to conclude plaintiffs from inquiry touching the fraud than would the original contract have been, had it been wholly reduced to writing. But the defendant, having deceived the plaintiffs, and procured from them their money through fraud, while acting in the capacity of an agent for them, the law declares him a trustee *ex maleficio*, in spite of the contract which he induced them to enter into by misleading them as to the real terms of the purchase from the original owners. So it must hold him, because of his *mala fides*, a trustee of the land he purchased with plaintiffs' money, in spite of the deed which he in like manner and by the same fraudulent scheme or intrigue induced them to accept. No person can be precluded by any contract or writing that he has been induced to enter into through fraud or deceit, and the circumstance that the writing happens to be a deed of warranty, and executed with the greater solemnity, cannot alter the rule, so that we are constrained to hold that the plaintiffs are not precluded by the deed to insist upon the relief demanded.

AFFIRMED: REHEARING DENIED.

Argued 12 October, decided 31 October; rehearing denied 28 November, 1904.

DUFF v. WILLAMETTE STEEL WORKS.

[78 Pac. 363, 668; 17 Am. Neg. Rep. 121.]

BLACKSMITH AS FELLOW SERVANT WITH A HELPER.

1. A blacksmith merely working in a machine shop for wages, and not intrusted with any duty toward other employes, is a fellow servant with a helper of another blacksmith at another forge.

NEED OF PLEADING NEGLIGENCE OF FELLOW SERVANT.

2. Under Section 72 of B. & C. Comp., requiring an answer to contain a general or specific denial of every material allegation controverted by defendant and a statement of any new matter constituting a defense or counterclaim, a defense that an injury complained of was the result of the negligence of a fellow servant, is new matter which defendant must plead, in order to render the same available.

EFFECT OF NEGLIGENCE OF FELLOW SERVANT—NONSUIT.

3. If it clearly appears from the testimony offered on behalf of the plaintiff in a personal injury case that the injury resulted from the negligence of a fellow servant the court should enter a nonsuit, though that defense is not pleaded, since it is thereby apparent that plaintiff has not a cause of action.

INSTRUCTION ON ISSUES NOT MADE BY PLEADINGS.

4. In an action for personal injuries, an instruction is erroneous which permits a verdict for defendant, if the injury resulted from the negligence of a fellow servant, where that defense is not pleaded.

From Multnomah: **ARTHUR L. FRAZER**, Judge.

Statement by **MR. JUSTICE BEAN**.

Action by M. L. Duff, as administrator of James Duff, deceased, against the Willamette Iron & Steel Works. This is an action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant. The defendant is the owner of a foundry and machine shop in Portland, and has in connection therewith a blacksmith shop, in which are five or six forges. At the time of the accident E. W. Jones was the general foreman of the defendant; John Hylander was a blacksmith in its employ; and the plaintiff's intestate was a blacksmith's helper, working at a forge about twenty feet from the forge where Hylander worked. Some weeks before a customer of the defendant had left with it a hollow piston head, which had formerly been used, to be shrunk on a rod. The foreman told Hylander to take the

piston head, heat it in the fire, and shrink it on the rod. While he was heating it for that purpose, he noticed escaping steam, but did not remove the piston head from the fire, and it exploded, killing plaintiff's intestate. The complaint charges that it was defendant's duty to furnish plaintiff's intestate a safe place in which to work, and safe and suitable materials and appliances upon which to work; that, notwithstanding its duty in that behalf, through the negligence and carelessness of its agents and employes, it wrongfully caused the piston head to be put in the fire for the purpose of expanding the same, without examining it to ascertain whether it was safe to do so, and without first making an opening to the cavity, so that water and other substances therein, which might be generated into steam, could escape, and that by reason of such negligence the piston head exploded, killing plaintiff's intestate. The answer denies the negligence charged, and, for an affirmative defense, avers that the explosion of the piston head and the consequent injury to the plaintiff's intestate were due to an unavoidable and inevitable accident, against which defendant could not by reasonable care have guarded, and that the plaintiff's intestate was himself guilty of contributory negligence. The affirmative allegations of the answer were put in issue by the reply, and the trial resulted in a verdict and judgment for the defendant. Plaintiff appeals, assigning error in the giving and refusal of instructions by the trial court. REVERSED.

For appellant there was a brief over the names of *Chamberlain & Thomas* and *John F. Logan*, with an oral argument by *Mr. Geo. E. Chamberlain*.

For respondent there was a brief over the names of *Hogue & Wilbur* and *Joseph Simon*, with an oral argument by *Mr. Ralph W. Wilbur*.

MR. JUSTICE BEAN delivered the opinion.

Several points are made in the brief, and were urged at the argument, which are all grounded substantially on the contention that the court erred in instructing the jury that Hylander was a fellow servant of the deceased, and that plaintiff could not recover if the accident was caused by the negligence of Hylander. The question thus raised involves two inquiries: (1) Was Hylander in fact a fellow servant of the deceased? (2) Is the defense that the injury was the result of a fellow servant's negligence available to the defendant unless pleaded?

1. At the time of the accident, Hylander and the deceased were both engaged in the discharge of the duties of operatives. Hylander was not charged with the performance of any duty that the master owed to the deceased. It was not his business to provide a reasonably safe place in which the deceased could work. That duty had been intrusted by the defendant to other employes, and not to Hylander. Under the decisions, therefore, Hylander was a fellow servant of the deceased, for whose negligence the defendant is not liable to the plaintiff: *Mast v. Kern*, 34 Or. 247 (54 Pac. 950, 75 Am. St. Rep. 580); *Johnson v. Portland Stone Co.* 40 Or. 436 (67 Pac. 1013, 68 Pac. 425). In *Anderson v. Bennett*, 16 Or. 515 (19 Pac. 765, 8 Am. St. Rep. 311), the injury occurred through the negligence of one who was charged with the performance of the master's duty; while here the alleged negligent servant was a mere coemployé of the deceased, working at the time of the accident in a common employment. If the injury, therefore, was in fact due to his negligence, and not that of some agent or employé acting for the master, the defendant is not liable.

2. Upon the second question the authorities are in conflict: 13 Enc. Pl. & Pr. 913. In some jurisdictions it is

held that the defense that the injury complained of was due to the negligence of a fellow servant may be made under a mere denial of the negligence charged in the complaint: *Vinson v. Morning News*, 118 Ga. 655 (45 S. E. 481); *Sheehan v. Prosser*, 55 Mo. App. 569; *Wilson v. Charleston & Savannah R. Co.* 51 S. C. 79 (28 S. E. 91); *Sayward v. Carlson*, 1 Wash. 29 (23 Pac. 830). But other decisions hold that the defense, to be available, must be pleaded: *Conlin v. San Francisco, etc., R. Co.* 36 Cal. 404; *Bjorman v. Fort Bragg Redwood Co.* 104 Cal. 626 (38 Pac. 451); *Gibson v. Sterling Furniture Co.* 113 Cal. 1 (45 Pac. 5); *Layng v. Mt. Shasta Min. Spring Co.* 135 Cal. 141 (67 Pac. 48); *Higgins v. Missouri Pac. R. Co.* 43 Mo. App. 547; *Kerr-Murray Mfg. Co. v. Hess*, 98 Fed. 56 (38 C. C. A. 647). So far as we are informed the question has never before been presented to this court. In our opinion, the latter rule is more in harmony with the spirit and purpose of the Code and the previous decisions of the court than the former. The statute requires the answer to contain a general or specific denial of every material allegation controverted by the defendant, and the statement of any new matter constituting a defense or counterclaim: B. & C. Comp. § 72. The purpose of this provision is to require the answer to notify the plaintiff of the facts intended to be relied upon for a defense, so that he may prepare to meet them on the trial, and also to confine the inquiry on the trial to the issues actually made: *Troy Laundry Co. v. Henry*, 23 Or. 232 (31 Pac. 484). The statute has always been rather strictly construed, the court holding that evidence is inadmissible, under the denials, of facts which attempt to avoid the force and effect of the cause of action alleged in the complaint, such as contributory negligence, fraud, payment, estoppel, and the like, which must be affirmatively pleaded: *Rugh v. Ottenheimer*, 6 Or. 231 (25 Am. Rep. 513); *Remillard v. Prescott*, 8 Or.

37; *Grant v. Baker*, 12 Or. 329 (7 Pac. 318); *Guille v. Wong Fook*, 13 Or. 577 (11 Pac. 277); *Benicia Agr. Works v. Creighton*, 21 Or. 495 (28 Pac. 775, 30 Pac. 676); *Clark v. Wick*, 25 Or. 446 (36 Pac. 165); *Coos Bay R. Co. v. Siglin*, 26 Or. 387 (38 Pac. 192); *Farmers' Nat. Bank v. Hunter*, 35 Or. 188 (57 Pac. 424).

It is argued, however, in support of the position that the negligence of a fellow servant may be shown without pleading it, that the tendency of such evidence is to prove that there was no negligence whatever on the part of the defendant. If such be the effect of the evidence, it would be admissible under the denial, because the defendant has a right to give evidence under his denial controverting any fact necessary to be established by the plaintiff to authorize a recovery: Bliss, Code Pl. (2 ed.) §§ 330, 337; Pomeroy, Code Rem. (4 ed.) § 664; *Buchtel v. Evans*, 21 Or. 309 (28 Pac. 67). But we do not understand that the plaintiff is required to allege or prove, in the first instance, that the injury was not due to the negligence of a fellow servant, nor would evidence of such negligence controvert any fact necessary to be established by the plaintiff in order that he may recover. The fact that the injury resulted from defendant's negligence is put in issue by the denial. Defendant, therefore, may show affirmatively under the denial that the injury arose from some other cause, such as the act of some person not its agent or employé. When, however, the defense admits that some agent or employé of the defendant was negligent, but tends to show that plaintiff has no cause of action, because the negligent agent or employé was a fellow servant with the injured party, such defense, it seems to us, is new matter, and ought, under our system, to be pleaded.

The defense of negligence of a fellow servant is, in effect, a plea of confession and avoidance. It amounts to nothing more than an admission by the defendant that

one of its servants has been negligent, and an assertion that the plaintiff cannot recover on account thereof because of the relation sustained by him to the negligent servant. Such an admission would make the defendant liable under some circumstances and to some persons for the act of the negligent servant, but not to the particular servant injured, because of the rule of law alluded to. Proof that the injury resulted from the negligence of a fellow servant does not show or tend to show that the plaintiff's statements are untrue, nor does it show a want of negligence on the part of the defendant, but simply indicates a reason why the plaintiff cannot recover, notwithstanding such negligence, and ought to be pleaded. Judgment reversed and a new trial ordered.

REVERSED.

Decided 28 November, 1904.

ON MOTION FOR REHEARING.

MR. JUSTICE BEAN delivered the opinion.

3. Where, in a personal injury case, it clearly appears from plaintiff's testimony that the injury was due to the negligence of a fellow servant, he should be nonsuited, although such negligence is not pleaded as a defense, for the same reason that he should be if his proof shows that the injury was due to contributory negligence: *Tucker v. Northern Term. Co.* 41 Or. 82 (68 Pac. 426). But there is no such question in this case. The bill of exceptions does not purport to contain all the evidence, and the court below ruled—we must assume, correctly—that there was evidence tending to show that the death of plaintiff's intestate was not due to the negligence of Hylander, a fellow servant, but to that of Jones, who stood in the place of and represented the master.

4. There was a controversy as to whether there was any negligence at all, and, if so, whether it was that of Jones or Hylander. The court charged the jury that, if the accident was due to the negligence of Jones, plaintiff could recover, but, if to that of Hylander, he could not. The latter instruction was error, because it submitted to the jury a defense not pleaded, and it is immaterial whether it was based upon testimony given by the plaintiff or the defendant. The statement in *Wild v. Oregon Short Line Ry. Co.* 21 Or. 159 (27 Pac. 954), that "the negligence of a co-servant with plaintiff engaged in the same general undertaking could not be said to be the negligence of the defendant," was plainly by way of argument only, and was not a decision of a point involved in the case. *Higgins v. Missouri Pac. Ry. Co.* 43 Mo. App. 547, was not overruled, though disapproved, by *Sheehan v. Prosser*, 55 Mo. App. 569. The former was a decision by the Kansas City Court of Appeals and the latter by the St. Louis Court of Appeals. Both courts are of equal dignity and rank, and have simply taken opposite views upon a disputed question. REVERSED: REHEARING DENIED.

Decided 5 November, 1904.

WADHAMS v. ALLEN.

[78 Pac. 362.]

45 485
e47 283

APPEAL—TIME FOR TAKING—DATE OF FINAL ORDER.

An appeal from the final order in a case must be taken within the time limited after the date of that order and not from the date of some subsequent order, as, for example, the order settling the costs.

Appeal from Multnomah County.

Suit by William Wadhams and others, partners as Wadhams & Kerr Bros., against Allen & Lewis, a corporation. From a decree for defendant, plaintiffs appeal. Defendants now move to dismiss the appeal. DISMISSED.

Mr. Wirt Minor for the motion.

No appearance *contra*.

PER CURIAM. In February, 1903, the plaintiffs commenced a suit to enjoin and restrain the defendant corporation from using a certain kind of label or wrapper, or from selling or offering for sale canned goods bearing such label, on the ground that it was an imitation or infringement of the one used by them. Issue was joined, a trial had, and a decree rendered and entered on June 25, 1903, dismissing the plaintiffs' suit, with judgment for costs and disbursements in favor of the defendant. A cost bill was filed on the same day, to which sundry objections were seasonably made, which objections came on for hearing and were overruled February 18, 1904, the court ordering and adjudging "that defendant have and recover of and from plaintiffs the sum of \$515.35, costs and disbursements." On May 25, 1904, the plaintiffs gave notice that they appealed to this court from the judgment and decree of the circuit court "entered on the 18th day of February, 1904, in favor of the defendant against the plaintiffs, and from the whole of said judgment and decree."

The errors assigned in plaintiffs' abstract all go to the merits of the decree dismissing the suit, and not to the taxation of costs. As we understand it, the attempted appeal does not seek to challenge the correctness of the latter judgment, the purpose being to bring up for review the merits of the controversy between the parties. Under this view, the facts bring the case within the recent decision of *Lemmons v. Huber*, 45 Or. 282 (77 Pac. 836), and, for the reasons therein given, the motion to dismiss the appeal must be sustained, because the appeal was not taken within the time allowed by law.

DISMISSED.

Argued 20 October, decided 28 November, 1904.

MEYER v. LIVESLEY.

[78 Pac. 670.]

ASSIGNABILITY OF CROP LEASE WITHOUT LANDLORD'S CONSENT.

A lease of farming land carrying the use of divers implements of husbandry thereon owned by the lessor, the rent to be a proportion of the crop, is usually unassignable without the lessor's consent. Such an assignment will ordinarily work a forfeiture. In the present case the lease was evidently made on account of confidence in the skill of the lessee, though it did not stipulate particularly as to the manner of cultivating the crop, and must be considered a personal contract.

From Polk: REUBEN P. BOISE, Judge.

Suit for an injunction by J. W. Meyer against T. A. Livesley & Co. and John Vincent, resulting in a decree as prayed for, from which Livesley & Co. appeal.

REVERSED.

For appellants there was a brief over the names of *William M. Kaiser* and *Woodson T. Slater*, with an oral argument by *Mr. Slater* and *Mr. Wirt Minor*.

For respondent there was a brief and an oral argument by *Mr. John H. McNary* and *Mr. Oscar Hayter*.

MR. JUSTICE BEAN delivered the opinion.

This is a suit to restrain the defendants from trespassing upon or interfering with the plaintiff's possession of a hopyard. On March 7, 1900, I. M. Simpson, being the owner of a certain tract of land in Polk County, upon which the hopyard in question was situated, leased the yard, with the improvements thereon, consisting of dry kilns, hop poles, etc., to the defendants, for the years 1900 to 1904, inclusive. On October 25, 1902, the defendants sublet the yard, together with the hop kilns, baler, and farming implements mentioned in the lease from Simpson to them to W. D. Huston, agreeing to furnish Huston one of the dwelling houses on the Simpson place, or to remodel another building thereon, and the use of Simpson's horses

in the cultivation of the hops at a certain stipulated rate per day, in consideration of which Huston agreed to pay them, as rental, one fourth of the "average quality" of the hops produced on the land during the years of 1903 and 1904. On January 11, 1904, Huston assigned to the plaintiff all his right and interest in and to the lease or contract between himself and the defendants. This assignment was not recorded, and on January 23, 1904, the defendants, without knowledge or notice thereof, entered into a new lease with Huston for the current year, taking from him a mortgage on his interest in the crop to be grown during that year to secure a balance due for advances made the previous year. It was stipulated in the new lease that, in case of a violation of any of its terms by Huston, the defendants should have the right to reënter and take possession of the hopyard, to complete the cultivation of the crop, and harvest and sell it, paying over the surplus, if any, to Huston. In March, 1904, the defendants attempted to enter and take possession of the hopyard, on account of a violation of the provisions of the lease or agreement between them and Huston, when this suit was brought by the plaintiff to enjoin them from doing so.

The only question we deem it necessary to consider is whether the lease from the defendants to Huston, made in October, 1902, was assignable by Huston without the consent of the defendants. The plaintiff claims title under such an assignment, but, unless Huston had authority to assign the lease to him, he has no standing in court, and the other questions become immaterial.

As a general rule, the power of assignment is incident to the estate of a lessee of real property, unless it is restrained by the terms of the lease: Wood, Land. & Ten. p. 529; Taylor, Land. & Ten. (9 ed.) § 402. But a lease of land upon shares, including the use of buildings, farm implements, stock, and other personal property, is re-

garded as a personal contract, and not assignable without the consent of the lessor, because the amount to be received by the lessor, and the care of the property depend upon the character, industry, and skill of the lessee: Taylor, Land. & Ten. (9 ed.) §§ 24, 24a; *Randall v. Chubb*, 46 Mich. 311 (9 N. W. 429, 41 Am. St. Rep. 165); *Lewis v. Sheldon*, 103 Mich. 102 (61 N. W. 269). *Randall v. Chubb* is much in point. Chubb leased certain premises to Stoddard upon shares for the term of three years, with the privilege of five. Stoddard was to do all the work, find all the seed, and deliver to the lessor one third of the crop. The farm was to be cropped in a certain specified way, and, as in the case at bar, the lessee was to have the use of certain property belonging to the lessor. The court held that the lease was not assignable, and that an attempt to assign it worked a forfeiture of the estate of the lessee, and the lessor could take immediate steps to recover possession. "The very nature and character of the lease or agreement," says Mr. Chief Justice MARSTON, "shows that it was a personal one to the defendant, and could not be assigned by him to a third party without the consent of his lessor. The rent or share which the latter would receive must depend very much upon the character of the lessee, and the latter could not place a party in possession of the premises who might not be a good husbandman, and who might not be able to carry on the farm operations in a good, careful, and proper manner. Under such a lease the landlord has a right to choose his tenant, and he may be willing to lease upon shares to one man, and yet be wholly unwilling to let another have possession upon any terms. So, with reference to the use of his farm implements, one might be a careful, prudent man, who would take good care of them, while another, more reckless, would not by the owner be permitted to use them upon

any terms." The same principle was reaffirmed in *Lewis v. Sheldon*, 103 Mich. 102 (61 N. W. 269).

The cases of *Dworak v. Graves*, 16 Neb. 706 (21 N. W. 440), and *Yates v. Kinney*, 19 Neb. 275 (27 N. W. 132), are not in fact in conflict with this doctrine. They involve the right of a lessee of property on shares to sell or mortgage his interest in the crop after it has been grown without the consent of the lessor, and not the right to assign or transfer all his estate or interest under the lease to another before the crop is raised. The terms of the lease from the defendants to Huston bring it directly within the doctrine of the Michigan cases. The lease included not only the hopyard, the successful cultivation of which necessarily depended upon the industry and skill of the lessee, but also the use of certain buildings, farm implements, and personal property, the care of which likewise depended upon the character of the lessee. In addition to this, the lease is indefinite as to its terms. It does not contain any stipulation as to the manner in which the hops shall be cultivated, cared for, harvested, or prepared for the market—provisions usual in leases of real property. Its nature and terms would seem to indicate that it was made by the defendants in reliance upon the ability, character, and skill of Huston. From the character of the agreement and the subject-matter thereof, we are led to conclude that it was a personal contract, which Huston could not assign or transfer so as to substitute another in his place as lessee without the consent of the defendants.

These views result in the reversal of the decree and the dismissal of the bill, and it is so ordered. REVERSED.

Argued 18 October, decided 31 October, 1904, rehearing denied.

CULVER v. RANDLE.

[78 Pac. 894.]

APPEAL — NECESSARY INTEREST OF APPELLANT — SUBSTITUTION.

1. In view of Section 38, B. & C. Comp., providing that no action shall abate by the death or disability of a party, or by transfer of any interest, if the cause of action survive or continue, and that, in case of death or other disability, the court may within a year allow the action to be continued by or against the personal representatives or successor in interest, a change of the interest of a party after judgment does not affect a pending appeal, and no substitution is necessary.

SATISFACTION OF JUDGMENT — EFFECT OF ON APPEAL.*

2. Before a satisfaction of a judgment can operate as an abandonment of an appeal it must clearly appear that the compliance with the final order was voluntary.

BILL OF SALE AS MORTGAGE — REPLEVIN — ALLEGATIONS AND PROOFS.

3. In replevin for chattels in which plaintiff claims an interest under a mortgage, the conditions of which have been broken, proof of such facts may be made under an allegation of absolute ownership.

BILL OF SALE AS MORTGAGE — FORM OF EXECUTION.

4. Under the provisions of Section 5630, B. & C. Comp., requiring that instruments intended to operate as chattel mortgages "shall" be executed, witnessed, and acknowledged as conveyances of real property, such instruments must be so acknowledged or they are defective.

AMBIGUOUS INSTRUCTION.

5. An instruction that, if the instrument under which plaintiff claimed was intended as a mortgage, the jury should so find, was not fatally ambiguous by reason of the fact that it was impossible to say whether they were required to make a special finding, or whether they should find for plaintiff or defendant.

REPLEVIN AGAINST SHERIFF — EFFECT OF APPLICATION OF THE PROPERTY TO PAYMENT OF THE CLAIM ASSERTED BY THE SHERIFF.

6. An officer seizing property under a writ can assert only the right to apply it to the payment of the claim on which the writ is based, and if that has been accomplished by another proceeding, the officer is not entitled to further possession. If he has been sued for it in replevin, he is entitled to only costs if he wins after the property has been so applied.

From Josephine: HIERO K. HANNA, Judge.

Statement by MR. CHIEF JUSTICE MOORE.

This action was instituted in the county court of Josephine County by Alice H. Culver against John Randle

*NOTE — As to the effect on the appeal of a satisfaction of the judgment by accepting the benefit thereof see *Portland Const. Co. v. O'Neill*, 24 Or. 54; *Bush v. Mitchell*, 23 Or. 92; *Jacksonville School Dist. v. Crowell*, 33 Or. 11; *Stemmer v. Scottish Ins. Co.* 33 Or. 66, 85; *Moore v. Moores*, 36 Or. 261, 264; *Merriam v. Victory Min. Co.* 37 Or. 321, 324; *New Zealand Ins. Co. v. Smith*, 41 Or. 466, 467.

to recover possession of certain household goods, furniture, crockery and glassware, table linen, etc., or the sum of \$325, the alleged value thereof, in case possession could not be secured, the complaint being in the usual form. The answer denied the material allegations of the complaint, and averred that on December 1, 1902, one C. F. Lamson was the owner and in possession of such property, and, being indebted to H. C. Bobzien, the latter commenced an action against him in the justice's court of Grants Pass District to recover \$117.31, the sum so due, and a writ of attachment having been issued therein, the defendant, as constable, in pursuance thereof, seized the goods in question as the property of Lamson. For a further defense, it is alleged that prior to such seizure Lamson executed a bill of sale of the goods to plaintiff herein, but the pretended transfer was without consideration, and made with intent to delay and defraud his creditors, and that after executing the instrument, and until the goods were so seized, he was in possession and had full control thereof. The reply denied the allegations of new matter in the answer, and averred that on November 26, 1902, Lamson was indebted to plaintiff in the sum of \$500, in part payment of which he sold and delivered to her the personal property in controversy for \$325, which sum she credited on his account; taking and holding exclusive possession of the property until December 1, 1902, when it was seized by the defendant. A trial was had in the county court and a judgment rendered for plaintiff January 2, 1903, as prayed for in her complaint, from which the defendant on the following day appealed to the circuit court for that county. Prior to the trial of the cause, however, plaintiff filed in the latter court a supplemental complaint, alleging that she caused an execution to be issued on her judgment, in pursuance of which the sheriff of such county on January 3, 1903, took the

property in question from defendant and delivered it to her; that thereafter, but on the same day, Bobzien, who had secured a judgment in the justice's court against Lamson, caused an execution to be issued thereon, in obedience to which Ernest Lister, a deputy sheriff, assisted by Bobzien and others, immediately took such property, by breaking and entering the premises where it was held by her, carried it away, and converted it to their own use; that on January 3, 1903, she commenced an action in the circuit court for that county against Lister, Bobzien, and others, to recover damages resulting from their trespass, which cause was then pending—and praying that the defendant's appeal be dismissed. The answer to such complaint, after denying the material allegations thereof, avers that on January 3, 1903, Lister, by virtue of plaintiff's execution, took the property from defendant, and that, since the supplemental complaint was filed, plaintiff's action against Lister and others had been tried, and judgment rendered therein in her favor. The plaintiff's counsel thereupon moved the court for judgment on the pleadings on the ground that the answer to the supplemental complaint did not constitute a defense, and also disclosed that she was entitled to the relief demanded. The motion was overruled, and, the appeal having been tried, judgment was rendered for the defendant herein, to the effect that he recover from plaintiff the property described in the complaint, or the sum of \$325, the value thereof, and she appeals to this court. REVERSED.

For appellant there was an oral argument by *Mr. Harry D. Norton*, with a brief to this effect.

When the principals, Bobzien and Thomas, abandoned their defense of justification set up by the constable under the writ of attachment issued out of the justice court by holding under a writ of execution thereafter issued against

the same property, the grounds of their defense ceased and terminated, and they had no standing in the circuit court upon the appeal, which necessarily also ended the rights of Constable Randle, who was only their agent: *State v. Martin*, 30 Or. 108 (47 Pac. 196); *Robinson v. Carlson*, 34 Or. 319 (55 Pac. 959); *Moore v. Moore*, 36 Or. 261 (59 Pac. 327); *State v. Grand Jury*, 37 Or. 542 (62 Pac. 208); *Flanagan Bank v. Graham*, 42 Or. 403 (71 Pac. 137, 790); *In re Woodworth*, 64 Hun, 522; *Hodgeman v. Barker*, 16 N. Y. Supp. 76; *People v. Troy*, 82 N. Y. 575; *Pelham v. Rose*, 76 U. S. 103; *Hoskins v. McGirl*, 12 Mont. 246; *Wilson v. Russell*, 40 Iowa, 697; *Hazen v. Concord R.* 63 N. H. 390; *Hice v. Orr*, 16 Wash. 163; *State v. Meacham*, 17 Wash. 429; *Lynde v. Dibbie*, 19 Wash. 330; *In re Kaeppler*, 7 N. D. 309; *State v. Sloan*, 69 N. C. 128; *State v. Richmond*, 74 N. C. 287; *Russell v. Campbell*, 112 N. C. 404; *Bradley v. Ewart*, 18 W. Va. 598; *Williams v. Tyler*, 17 S. W. 276; *State v. Loomis*, 29 S. W. 415.

For respondent there was a brief over the name of *Robert Glenn Smith*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

1. It is contended by plaintiff's counsel that the property in question having been taken from their client January 3, 1903, by Lister, his seizure thereof deprived defendant of all right thereto, including his interest in the appeal, in refusing to dismiss which the trial court erred. It is argued that Bobzien was the principal, and the defendant and Lister were his respective agents; that the selection of the latter to enforce the writ of execution discharged the former, deprived him of all right to recover the possession of the property or the value thereof; and that, in failing to substitute Lister as a party, the appeal should have been dismissed.

Our statute prescribing the parties entitled to continue the prosecution or defense of causes is as follows: "No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In the case of the death, marriage, or other disability of a party, the court may, at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representatives or successor in interest": B. & C. Comp. § 38. In construing this section, DEADY, J., in *Elliott v. Teal*, 5 Sawy. 249 (Fed. Cas. No. 4396), held that it abolished the common-law rule that an action abated by the termination or transfer of the plaintiff's interest in the subject-matter *pendente lite*, and that the suit, having been commenced by the real party in interest, might be prosecuted to final judgment in his own name, notwithstanding a transfer of his interest therein pending the litigation. In referring to that case in *Merriam v. Victory Min. Co.* 37 Or. 321 (56 Pac. 75, 58 Pac. 37, 60 Pac. 997), it was intimated that the right of an assignee of the subject-matter of an action to be substituted as a party during the litigation was doubtful. In *Long v. Thompson*, 34 Or. 359 (55 Pac. 978), it was held that the death of a party pending a review of the proceedings did not abate the appeal, notwithstanding an application for a substitution was not made within the time prescribed. In California, under a statute providing that, in case of any transfer of interest in a cause, the action may be continued in the name of the original party, or "the court may allow the person to whom the transfer is made to be substituted in the action or proceeding," it was ruled that the assignment mentioned, which necessitated a substitution of a party, related to a change of interest in the subject-matter made before the entry of the judgment in the action: *Emerson v. McWhirter*, 128 Cal. 268 (60 Pac. 774).

In those states in which the rule prevails that an appealable interest must exist at the time the appeal is taken, it is generally held that, if a party disposes of all his interest in the subject-matter before seeking to review the judgment or decree, his right to an appeal therefrom is lost: 2 Enc. Pl. & Pr. 167. If such a rule were in force in this State, motions to dismiss appeals, based on the assignment of an interest in the subject-matter, would probably involve the question as to whether the transfer was made before or after the notice of appeal was given or served, and the jurisdiction of the appellate court might be made to depend, not on an inspection of the transcript, but on the consideration of evidence as disclosed by *ex parte* affidavits. So, too, a party to an appeal might insist upon or oppose the substitution of an adverse party, just as it conduced to or militated against his advantage; and, if the assignment of an interest in the subject-matter pending an appeal suspended the right of the assignor or the assignee to review the judgment or decree, the fact of the transfer, if alleged or denied, might also depend upon the preponderance of evidence, and result in delaying the trial of causes on appeal. Considering the possible consequence that might result from a change of appellants or respondents, the substitution of a party after the rendition of a judgment or a decree, except in the case of death or disability, is not, in our opinion, necessary to the prosecution or defense of an appeal, where a statute like ours regulating the procedure does not in express terms command such change.

2. It may well be doubted, however, if the defendant's authority to continue the appeal was at all impaired by the seizure of the property under the execution issued on Bobzien's judgment, for the issue in replevin is the right to the possession of the property at the time the action was commenced: Cobbey, Replevin (2 ed.), § 979. If by

a proceeding *in invitum* the satisfaction of an execution precludes the review of the judgment on which it is based, a party might thus be unjustly deprived of the right of an appeal in all cases of judgments or decrees given in actions or suits upon contracts, notwithstanding an undertaking may have been given for a stay of proceedings: B. & C. Comp. § 552. In order to justify the dismissal of an appeal on the ground that the litigation is settled in obedience to the court's order, the fact must be clear and conclusive that the compliance therewith was voluntary and with a view to its satisfaction: *Plano Mfg. Co. v. Rasey*, 69 Wis. 246 (34 N. W. 85). The bill of exceptions does not disclose that the defendant freely surrendered the possession of the property to the sheriff, and hence we conclude no error was committed in refusing to dismiss the appeal.

3. It is contended by plaintiff's counsel that the court erred in admitting over their objection and exception testimony tending to show that the bill of sale executed by Lamson to plaintiff was intended as a mortgage; and, an exception having been taken to the following part of the court's charge, it is also maintained that an error was committed in giving it.

"You are further instructed that if you believe by the evidence that the bill of sale was not intended as a bill of sale or conveyance by Lamson, but was intended as a mortgage for a debt owing by Lamson to plaintiff, then, in this connection, the instrument which purported to be a bill of sale was for the purpose of this cause a mortgage or deed of trust; but the instrument was defective by reason of the fact that it was not executed as the law prescribes, and if you believe from the evidence that the said instrument was intended as a deed of trust, or a mortgage as security for a debt, you should so find. In reading this instruction I have said, 'but the instrument was defective for the reason that it was not executed as the law of this

State prescribes'; that is, if it was intended as a mortgage, it is defective, but, if it was intended as a bill of sale, and was a bill of sale, then it was not defective."

It is argued that the answer having admitted that Lamson executed a bill of sale to plaintiff, and alleged that the pretended transfer of the property was without consideration and fraudulent, the testimony so objected to, and the instruction based thereon, were without the issues, and prejudicial to plaintiff's rights. The rule is settled in this State that a chattel mortgage is a conditional sale of personal property, and after breach of its terms a mortgagee has such a qualified right to the property as to enable him, under an allegation of absolute ownership, to maintain an action of claim and delivery for its possession: B. & C. Comp. § 5636; *Moorhouse v. Donaca*, 14 Or. 430 (13 Pac. 112); *Reinstein v. Roberts*, 34 Or. 87 (56 Pac. 90, 75 Am. St. Rep. 564); *Mayes v. Stephens*, 38 Or. 512 (63 Pac. 760, 64 Pac. 319.) If an action of replevin can be sustained under an averment of absolute ownership, when plaintiff's right to the property sought to be recovered is evidenced by and depends upon a chattel mortgage, in which there has been a breach of conditions, we see no reason why a defendant in such action, having admitted in his answer the execution of a bill of sale of goods and chattels, and alleged that it was void as to the creditors of the vendor, may not, with equal reason show on the trial that the instrument was intended as security for the payment of a debt or the performance of an obligation. If, after filing an answer in an action of replevin, the defendant discovers that a bill of sale attacked as fraudulent was intended as a mortgage, he ought to be permitted to prove that fact, if by doing so it would promote justice and defeat the plaintiff's recovery, for, as the right to amend a pleading rests in the sound discretion of the trial court, it would follow that if a defendant

was obliged to apply for leave to rectify a mistake or to correct his want of knowledge, and was not permitted to do so, he would be deprived of a valuable right to his prejudice. The testimony so objected to was, in our opinion, admissible.

4. The statute prescribing the manner in which a conditional sale of personal property must be signed, sealed and delivered, is as follows: "Any chattel mortgage, deed of trust, conveyance, or other instrument of writing intended to operate as a mortgage of personal property alone, or with real property, shall be executed, witnessed and acknowledged, or certified, or proved, in the same manner as conveyances of real property": B. & C. Comp. § 5630. In the case at bar the bill of sale, if intended as a mortgage, is not acknowledged certified, or proved as a conveyance of real estate, and that part of the court's charge excepted to correctly states the law in relation to the execution of the writing.

5. The instruction challenged tells the jury, if it should appear to them that the instrument was intended as a mortgage, they should so find. It is impossible to say whether they were required to make special findings, or whether or not they should find for the plaintiff or the defendant. As no request seems to have been made curing the ambiguity, which we do not consider fatal, no error was committed in giving the instruction in question.

The bill of exceptions does not purport to contain all the testimony introduced at the trial, nor all the instructions given. If it be assumed that possession under the chattel mortgage imported such notice to interested parties as to cure the defect in its execution, that fact is not disclosed by the transcript, nor does it appear therefrom that the court was requested to charge the jury in relation thereto.

6. It will be remembered that the judgment brought up for review by this appeal awards to the defendant the recovery from plaintiff of the personal property described in the complaint or the sum of \$325, the value thereof, notwithstanding the goods were taken from her January 3, 1903, by Lister, and never returned. To enforce this judgment strictly would not only deprive plaintiff of her alleged ownership of the property and of the right to its possession, but also compel her to pay its value, a mere statement of which demonstrates the apparent injustice of such determination. As the defendant's seizure of the goods under the writ of attachment was to satisfy any judgment that Bobzein might secure in the justice's court against Lamson, the subsequent application of the property by Lister in payment of such judgment abrogated the defendant's right to a return of the goods, or to a recovery of their value. The issue tried was the right of possession of the property December 1, 1902, when it was attached, and, as the jury found for the defendant thereon, the judgment should have been in his favor for only the costs and expenses incurred.

The judgment will therefore be reversed and the cause remanded, with directions to give judgment in accordance the views herein expressed. REVERSED.

Argued 25 October, decided 28 November, 1904.

DECHENBACH v. RIMA.

[77 Pac. 391, 78 Pac. 666.]

FORCIBLE DETAINER — APPEAL TO SUPREME COURT.

1. Under Section 548 of B. & C. Comp., which provides that any party to a final order may appeal therefrom to the supreme court, either party to a judgment in a forcible entry and detainer action in the circuit court may appeal therefrom.

DISMISSING APPEAL.

2. The question of plaintiff's right to appeal to the circuit court from a justice's judgment is one for the circuit court to pass upon in the first instance, and

its decision may be reviewed on appeal in a proper case, but the validity of that appeal cannot be raised on a motion to dismiss the appeal from the judgment of the circuit court.

PAROL LEASE — STATUTE OF FRAUDS.

3. A parol agreement to lease real estate for more than a year is void under the statute of Oregon: B. & C. Comp. § 797, subds. 1 and 6.

ESTOPPEL TO DENY ORAL LEASE.

4. A parol promise to lease certain real estate for a term of years, on which a party has relied in purchasing a stock of goods on the premises, is a mere promise as to future action with respect to a right to be acquired under an agreement not yet made, and does not estop the landlord from denying the validity of such contract under the statute of frauds.

SPECIFIC PERFORMANCE OF ORAL PROMISE TO LEASE.

5. A tenant having entered into possession of certain premises under an unexpired lease to his vendor, and paid an extra price for the fixtures and made valuable improvements in reliance on the landlord's oral promise to give a written lease for a period exceeding one year, is not entitled to enforce the agreement in equity, since he did not enter under the agreement, or partly perform it, the landlord having refused to recognize his agreement before the expiration of the term of the vendor: *Wallace v. Scoggins*, 18 Or. 502, distinguished.

From Multnomah: MELVIN C. GEORGE, Judge.

Action by J. Dechenbach against D. C. Rima for possession of a building occupied as a saloon in East Portland, and resulted from a refusal of the defendant to sell only the Gambrinus beer on the premises. This appeal is from a judgment of the circuit court in favor of defendant.

MOTION TO DISMISS OVERRULED: REVERSED.

Decided 5 July, 1904.

ON MOTION TO DISMISS APPEAL.

Mr. Edw. Mendenhall, for the motion.

Mr. Joseph N. Teal, contra.

PER CURIAM. This case originated in the justice's court, being an action for forcible entry and detainer. The plaintiff recovered judgment in that court, and the defendant appealed to the circuit court, wherein he was successful. The plaintiff has now appealed to this court, which appeal the defendant moves to dismiss on the ground that the plaintiff is without right of appeal.

1. There appears to be no limitation to the right of appeal from the circuit to the supreme court (B. & C. Comp. § 548), and there is certainly no exception against an appeal from a judgment rendered in a forcible entry and detainer action.

2. If it be admitted, as defendant's counsel argues, that plaintiff has no appeal in such an action from the justice's to the circuit court, a matter which we do not now decide, it cannot help the defendant here, as he himself took the case to the circuit court on his own appeal, and the question whether the plaintiff has an appeal from the justice's court has not arisen and could not have arisen from the very nature of the record, and is therefore not here for our determination. If the question had arisen, it would have been a matter for the circuit court to pass upon first, and we should have had it for review, so that in any event it would not have presented a question for dismissal of the appeal to this court: *Mendenhall's Will*, 43 Or. 542 (72 Pac. 318). The motion will be denied.

MOTION OVERRULED.

ON THE MERITS.

For appellant there was a brief over the name of *Teal & Minor*, with an oral argument by *Mr. Wirt Minor*.

For respondent there was a brief over the name of *Edw. & A. R. Mendenhall*, with an oral argument by *Mr. Edward Mendenhall*.

MR. JUSTICE BEAN delivered the opinion.

This was an action of forcible entry and detainer. The plaintiff had judgment in the justice's court, but upon an appeal defendant prevailed in a trial in the circuit court. The plaintiff is the owner of certain premises in Portland, known as No. 400, East Morrison Street. In June, 1903,

one Lake was in possession thereof under an oral agreement as tenant from month to month, paying his rent in advance. Lake had paid his rent to July 1, 1903, and on the 11th day of June he sold his business to the defendant, Rima, who immediately took possession. On June 25th, and before the expiration of the month for which Lake had paid the rent, the plaintiff served notice to quit upon Rima and Lake, but Rima refused to vacate, and thereupon this proceeding was commenced. The complaint is in the usual form in actions of this kind. The answer admits the plaintiff's ownership of the property in question, but denies his right to the possession, or that defendant's holding is unlawful. For a further and separate defense it is averred that in June, 1903, Lake desired to sell his furniture, fixtures, stock of goods, and good will to the defendant for \$2,500—being \$1,500 more than the property was reasonably worth, unless the buyer could secure a lease from the plaintiff from July 1, 1903, to July 1, 1906, at a monthly rental of \$115; that the defendant was unwilling to make the purchase and pay more than \$1,000 for the business unless he could obtain such lease; that plaintiff, knowing such facts, in order to induce him to buy the property and business for \$2,500, to expend \$50 in improvements, and to occupy the premises from July 1, 1903, until January 1, 1906, at a monthly rental of \$115, "then and there wilfully represented to and promised defendant that if he would purchase said property and business so offered for sale from said Lake for \$2,500, and make said expenditure of \$50, and enter into possession of said premises thereunder, to occupy the same from July 1, 1903, until January 1, 1906, the plaintiff would, upon such purchase and expenditure being made, make him a lease for said term at said rental; that relying upon said representations and promise of plaintiff, and not otherwise, this defendant was induced to and did purchase said

property and business from said Lake, and paid him therefor \$2,500, and entered into and upon and occupied said premises and expended said \$50 on improvements and agreed to accept said lease"; that plaintiff has refused, and now refuses, to make the lease, although defendant has duly performed all the requirements on his part, and is ready, able, and willing to comply with the terms of the contract by the payment of the monthly rental during the term from July 1, 1903, to January 1, 1906; that by reason of these facts plaintiff is estopped to allege that defendant unlawfully occupies the premises, or any part thereof, by force.

3. There are many assignments of error, but all involve substantially the contention that the facts stated in the answer do not constitute an estoppel. That the alleged promise or agreement of the plaintiff to lease defendant the premises in controversy from July 1, 1903, to January 1, 1906, is void under the statute of frauds is not questioned: B. & C. Comp. § 797; *Pulse v. Hamer*, 8 Or. 251; *White v. Holland*, 17 Or. 34 (3 Pac. 573); *Rosenblat v. Perkins*, 18 Or. 159 (22 Pac. 598, 6 L. R. A. 257).

4. It is insisted, however, that under the facts alleged in the answer plaintiff is estopped by his conduct to deny the validity of such contract, or that defendant's possession of the premises is wrongful or unlawful. To this position there is a complete and obvious answer. Estoppel *in pais* arises from misrepresentation or concealment of a material fact, and rests on the ground that it would be a fraud in a party to assert what his previous conduct has denied when others have acted on the faith of that denial. Such an estoppel can rarely arise unless it has reference to a present or past state of things, or relates to an intended abandonment of an existing right; and it has no application to a mere breach of a promise or covenant relating to the future: 2 Bigelow, Estoppel (5 ed.), p. 574; 2 Herman,

Estoppel, § 730; 11 Am. & Eng. Enc. Law (2 ed.), 424, 425. "If the representation," says Mr. Justice FIELD, "relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion, liable to modification or abandonment upon a change of circumstances of which neither party can have any certain knowledge. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made." And again: "But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing": *Insurance Co. v. Mowry*, 96 U. S. 544. Now, in the case in hand, there was no false representation or concealment of any fact by plaintiff that induced the defendant to purchase Lake's business. The only contention is that in making such purchase he relied on the verbal promise of the plaintiff that, if he would buy the business, the plaintiff would thereafter execute to him a lease of the premises for more than one year. This contract was void by the statute of frauds, and is therefore void for all purposes. It conferred no right upon the defendant and created no obligation on the part of the plaintiff. Nor is the intent of the plaintiff in making the contract or agreement at all material. He may have intended never to perform, or may have expected that Rima would be subjected to inconvenience and loss by relying upon it; yet his liability is unchanged. The contract was one void under the

statute, and, as said by Mr. Justice ANDREWS in *Dung v. Parker*, 52 N. Y. 494: "That a party was ignorant of the law, or that he confided in the promise of another, and acted upon it to his disadvantage, has never been held to be an answer to the statute."

5. A parol contract for the leasing of real property, void under the statute of fraud, may be enforced by a court of equity when it has been so far partly performed by the lessee that it would be a fraud upon him unless the agreement should be fully performed: *Wallace v. Scoggins*, 18 Or. 502 (21 Pac. 558, 17 Am. St. Rep. 749); *McMahan v. Whelan*, 44 Or. 402 (75 Pac. 715). But, to have such an effect, there must be an entry into possession by the tenant under and by virtue of the contract, and other acts of part performance must have referred to and been in execution of such contract: *Barrett v. Schleich*, 37 Or. 613 (62 Pac. 792); *Waterman*, Spec. Perf. § 261; *Wheeler v. Reynolds*, 66 N. Y. 227. Now, there is no allegation that Rima entered into possession of the premises under the alleged contract with the plaintiff, or that he paid any rent thereunder, or did any act whatever in part performance of such contract. His entry was under and by virtue of the lease to Lake, and the improvements made by him were made during Lake's tenancy. Before the expiration of Lake's lease the plaintiff repudiated and refused to be bound by his oral contract with defendant for the subsequent leasing of the property, and had served a notice to quit. We are of the opinion, therefore, that the answer does not state facts sufficient to constitute a defense, and that the motion of the plaintiff for judgment should have been sustained.

REVERSED.

Argued 28 October, decided 28 November, 1904.

HIBBARD v. STEIN.

[78 Pac. 665.]

AGENCY — SALE OF SAMPLES BY TRAVELING SALESMAN.

1. A traveling salesman has no implied authority from the nature of his employment to sell the samples intrusted to him by his employer.

CONSTRUCTION OF CONTRACT WITH TRAVELING SALESMAN AS TO DISPOSITION OF SAMPLES — TITLE OF PURCHASER.

2. A contract employing a traveling salesman provided that the salesman should return all the samples to his employer, or sell them under the instructions of the house, and account for the same in cash or an itemized statement, naming the firm they are to be charged to, and required the salesman to pay cash for all samples unaccounted for at the end of the year or at the termination of the contract. The contract also had attached a schedule, which provided that samples were charged as cash, and must be paid for by salesmen, unless returned or their sale properly accounted for. *Held*, that such contract did not authorize the salesman to sell his samples except in pursuance of express instructions from his employer, and that a sale made without such instructions conferred no title on the purchaser.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Statement by MR. JUSTICE WOLVERTON.

This is an action by Hibbard, Spencer, Bartlett & Co. against Phillip Stein to recover possession of certain personal property intrusted to one Joe Diener as samples for use while engaged as a traveling salesman for the plaintiff. Diener sold the goods to defendant, and plaintiff claims that he did so without its authority; hence no title passed by the transaction, and that plaintiff is still the owner and entitled to the possession. Plaintiff being successful in the trial court, defendant appeals. AFFIRMED.

For appellant there was a brief over the name of *Bernstein & Cohen*, with an oral argument by *Mr. Alexander Bernstein*.

For respondent there was a brief and an oral argument by *Mr. Henry E. McGinn*.

MR. JUSTICE WOLVERTON delivered the opinion.

But a single question is presented for our determination, which is whether Diener was authorized by the plaintiff,

under his contract of employment, to sell the samples, and this depends for its solution upon a proper interpretation of the contract. The trial court was of the opinion that the contract did not confer the requisite authority. It permitted evidence to go to the jury, pro and con, touching the alleged existence of a general custom among dealers and their salesmen, whereby the right of salesmen to dispose of their samples at will is recognized, and upon which an implied authority was predicated, and instructed them as to that, but charged them, upon a construction of the contract, that Diener was not by its terms and conditions authorized or empowered to make the sale. If the court was right in this latter particular, the judgment should be sustained; otherwise, not.

1. A traveling salesman, known in modern business parlance as a "drummer," derives no implied authority from the nature of his employment to sell the samples with which his principal intrusts him as an aid to the discharge of the duties he engages to perform. Being essential and necessary to the performance of the salesman's undertaking, no reasonable inference can arise that he is to dispose of them, for, if he does, he is left without available means for exhibiting the goods of his employer. Nor is the principle that the agent is entitled to employ all necessary and usual means of executing the authority imposed adequate to the purpose: *Reinhard, Agency*, § 463; *Mechem, Agency*, § 343; *Savage v. Pelton*, 1 Colo. App. 148 (27 Pac. 948); *Kohn v. Washer*, 64 Tex. 131 (53 Am. Rep. 745).

2. The contract has appended a schedule, which is denominated "Suggestions and Instructions to Salesmen," and it is essential that the two instruments be read as one, in order to determine the intendment of the parties. Defendant's counsel rely upon the following paragraphs as

having conferred upon Diener ample authority to sell the goods in question to defendant.

This in the contract proper :

"It is distinctly understood and agreed by the party of the second part, that in accepting and receipting for samples, he shall return all of same to the party of the first part, or sell them under the instructions of and according to the established rules of this house and account for the same in cash or an itemized statement, naming the firm they are to be charged to ; and the party of the second part agrees to pay cash for all samples unaccounted for at the end of the year, or at the termination of this contract."

This in the schedule :

"4th. Samples are charged as cash and must be paid for by salesmen, unless returned or their sale properly accounted for. Samples sold must be entered on yellow sample department sheets and marked delivered. Otherwise you will not receive proper credit. Never leave samples of any kind about depots, hotels, or with irresponsible parties. Have them with you or in responsible hands, properly checked."

Three other paragraphs in the schedule are referred to as essential to an intelligent interpretation of the above. They are the following :

"14th. Sell no goods for future delivery unless under instruction from the house.

"16th. If there are any of these instructions that you do not fully understand, get explanation before leaving the house.

"17th. We have made these suggestions and given these instructions to salesmen so they may fully understand our wishes regarding the manner of doing our business upon the road."

It is conceded that Diener received no instructions from the house relative to the samples, or the sale or disposal thereof, except such as were contained in the schedule.

The clause of the contract providing that Diener shall return all samples, or sell them under instructions of and according to the established rules of the house, and account for the same in cash or an itemized statement, naming the firm they are to be charged to, recites an agreement exclusively on the part of the agent. It contains no agreement or direction on the part of the house. The fourth clause of the schedule, reciting that "samples are charged as cash, and must be paid for by salesmen, unless returned, or their sale properly accounted for," is a rule of the house, to which the agent has agreed, and by which he must abide when he takes out samples, and embodies neither a direction nor an instruction. By reference back to the contract it will be seen that the agent agrees to pay cash for all samples unaccounted for at the end of the year or the termination of his contract, so that the contract conforms to the rule, and there is no ambiguity in this particular. The clause following in the schedule, namely, "Samples sold must be entered on yellow department sheets and marked delivered. Otherwise you will not receive proper credit"—embodies both an instruction and a rule. What follow are instructions, but they have no especial bearing as matter important for interpretation. We look in vain for an instruction or direction under any conditions to sell these samples.* The circumstance of charging the samples to the agent as cash does not obligate him to pay for them, unless he fails to return them or account for their sale; much less does it authorize him to sell them. This analysis indicates to our minds the true intendment of the contract. The agent agrees to one of two things—either to return the samples, or to sell them under instructions and according to the rules of the house; not that, in the latter alternative, he has instructions to

*NOTE.—See note in 18 L. R. A. 663-667, Extent of the Authority Conferred upon Travelling Salesmen. REPORTER.

sell embodied in the schedule, or that any rule of the house permits him to do so, but that he shall sell when so instructed, which must come as an independent direction from the house should it at any time or for any reason desire the agent to dispose of them; and that, when a sale is made in pursuance of such instruction, then the agent shall account in cash or by an itemized statement, according to the nature of the sale.

It is argued that the fourteenth paragraph of the schedule, namely, "sell no goods for future delivery unless under instructions from the house," is a positive direction, unambiguous in any particular, and that, if the parties meant that samples should not be sold except under specific instructions, then they would have said so in as direct language; hence we are to infer that instructions for the sale of samples were intended. But this does not follow. The language of the paragraph referred to is, it must be conceded, more direct than that setting forth Diener's agreement to sell under the instructions; yet it appears to us that its purpose is not more clear. The plain meaning of the agreement that he shall sell under instructions is that he shall sell only when he has them, and, none being found in the schedule, it must be concluded that he sold without the intended or requisite authority, as measured by the terms of the contract. Clauses 16 and 17 cast no light that aids us in construing the contract. They are simply designed as admonitions to the salesman to obtain a full understanding of the instructions before entering upon the discharge of his duties and obligations, so that the interests of the house may be better subserved in accordance with its manner and ideas of transacting business.

This disposes of the case. Diener being without authority or power under the contract to dispose of these samples, defendant obtained no title by his purchase from

him without instructions from the house to sell them. The judgment of the trial court will therefore be affirmed, and it is so ordered. **AFFIRMED.**

Argued 20 October, decided 28 November, 1904.

HAGER v. KNAPP.

[78 Pac. 671.]

APPEALS FROM JUSTICE'S COURTS—SUPPLYING DIMINISHED RECORDS.

1. The authority of circuit courts in Oregon to correct records in cases appealed from justice's courts, or to supply omissions from such records, not being controlled by statute, is found in the inherent power of superior courts to control inferior tribunals, and is discretionary.

DISCRETION IN SUPPLYING DIMINISHED RECORD.

2. Though a superior court may, on its own motion, award a certiorari to a justice's court to correct a transcript on appeal, when an inspection thereof discloses that important parts of the record have been omitted, the general rule is that it will not do so when by failure or neglect of the appellant the transcript is too imperfect to show affirmatively the grounds of error relied upon.

IDEM—DISCRETION—CASE IN QUESTION.

3. Where a transcript on appeal from a justice disclosed that the original papers filed with the justice as exhibits were not attached, but no affidavit was filed by appellants showing that the omissions were injurious, or attempting to excuse their neglect, or disclosing when they first became aware of the fact, it was not an abuse of the circuit court's discretion to refuse a motion to permit an amendment of the record.

WHEN AND FOR WHAT PURPOSES CIRCUIT COURT ACQUIRES JURISDICTION OF A CASE APPEALED FROM A JUSTICE'S COURT.

4. Under Section 2248, B. & C. Comp., providing that when a transcript from a justice's court is filed in a circuit court the appeal is to be deemed perfected, the circuit court acquires jurisdiction for all purposes with full power to supply defective records when a transcript has been filed following a sufficient notice of appeal and a bond, though such transcript does not contain all that the statute requires.

JUSTICE'S COURTS—COSTS ON DISMISSING APPEAL.

5. After a circuit court has acquired jurisdiction of a case appealed from a justice's court it may give judgment for costs on dismissing the appeal.

From Polk: **GEORGE H. BURNETT**, Judge.

Statement by **MR. CHIEF JUSTICE MOORE.**

Action by B. Hager against L. E. Knapp and another. It was commenced in a justice's court in Polk County to recover money, and, an answer having been filed, the cause was tried and judgment rendered against defend-

45	512
48	516
45	512
48	375

ants, to review which they served a notice of appeal on plaintiff, gave the required undertaking, and within the time prescribed by law filed in the circuit court for that county a transcript of all the docket entries of the cause, but the justice failed to annex thereto any of the original papers filed with him. Based on the neglect in this particular, plaintiff's counsel, on the first day of the circuit court for that county next following the allowance of the appeal, moved to dismiss it; and two days thereafter defendants' counsel filed a cross-motion for a rule on the justice requiring him to annex the omitted papers to the transcript, and to amend his certificate thereto so as to show a compliance with the order desired. The latter motion was denied, the appeal dismissed, and judgment rendered against defendants for costs, and they appeal to this court.

AFFIRMED.

For appellants there was a brief over the names of *Julius N. Hart*, *W. H. Holmes*, and *Webster Holmes*, with an oral argument by *Mr. William H. Holmes*.

For respondent there was a brief and oral argument by *Mr. Oscar Hayter*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

The statute regulating the transfer of a cause on appeal from a judgment given in a justice's court is as follows: "On or before the first day of the term of the circuit court next following the allowance of the appeal, the appellant must cause to be filed with the clerk of such circuit court a transcript of the cause. The transcript must contain a copy of all the material entries in the justice's docket relating to the cause or the appeal, and must have annexed thereto all the original papers relating to the cause or the appeal and filed with the justice. Upon the filing of the transcript with the clerk of the circuit court, the appeal is

perfected, and thenceforth the action shall be deemed pending and for trial therein as if originally commenced in such court, and such court shall have jurisdiction of such cause and shall proceed to hear, determine, and try the same anew, disregarding any irregularity or imperfection in matters of form which may have occurred in the proceedings in the justice's court": B. & C. Comp. § 2246. An appeal from a judgment or decree given by a circuit court having been taken and perfected, the appellant is required to file with the clerk of this court a transcript of the cause: B. & C. Comp. § 553. When it appears by affidavit to the satisfaction of the supreme court that the transcript is incomplete in any particular substantially affecting the merits of the judgment or decree appealed from, it shall, on motion of the respondent, or may on the cross-motion of the appellant, make a rule upon the clerk correcting such omissions: B. & C. Comp. § 554. The statute contains no provision authorizing the circuit court to issue a rule on the justice commanding him to correct omissions in transcripts issued from his court. It does embrace, however, the following clauses, as tending to show the liberal policy relating thereto prescribed by the legislative assembly, to wit: "The appellate court may, in furtherance of justice and upon such terms as may be just, allow the pleadings in the action to be amended so as not to substantially change the issue tried in the justice's court, or to introduce any new cause of action or defense": B. & C. Comp. § 2247. "An appeal cannot be dismissed on the motion of the respondent (or) on account of the undertaking therefor being defective, if the appellant, before the determination of the motion to dismiss, will execute a sufficient undertaking and file the same in the appellate court, upon such terms as may be deemed just": B. & C. Comp. § 2249. An inspection of the enrolled bill on file in the office of the Secretary of State discloses that the word "or,"

placed in parentheses in the section last quoted, does not appear in the original record.

1. Though the duty is imposed on an appellant to see that a sufficient transcript or abstract of the proceedings in the court below is filed in the appellate court, if he presents an imperfect copy, the latter court, on suggestion of a diminution of the record, may, by certiorari, by mandamus, or by a rule to show cause, compel the custodian of the record to certify up for amendment any omission therefrom: 3 Cyc. 114. Every superior court, as an incident to and in aid of its appellate jurisdiction, possesses plenary power to compel, in a summary manner, an inferior court, tribunal, or officer to perform the obligation which the law enjoins on each, respectively, relating to the transfer of causes on appeal: *Che Gong v. Stearns*, 16 Or. 219 (17 Pac. 871); *McElvain v. Bradshaw*, 30 Or. 569 (48 Pac. 424). Thus, in *Bourne v. Mackall*, 1 Har. & G. 86, the record of the proceedings intended to be reviewed on a writ of error not having been sent up as required by law, a rule was issued requiring the plaintiff in error and the clerk of the lower court to show why a transcript had not been returned to and filed in the court of appeals.

The remedy adopted by a superior court to compel an inferior tribunal to supply omissions, on suggestion of a diminution of the record, is generally classed in text-books on new trial and appeal under the title of "Certiorari" (2 Enc. Pl. & Pr. 305); but, by whatever name it may be called, the relief granted is practically identical. In this State a writ of certiorari being known as a "writ of review" (B. & C. Comp. § 594), the process by which a defective transcript on appeal is amended on suggestion of a diminution of the record is denominated a "rule" (B. & C. Comp. § 554); but the latter procedure is analogous to a writ of mandamus, in that it compels an inferior court or person to perform an act which the law specially enjoins

as a duty resulting from an office, trust, or station: B. & C. Comp. § 604. It is also similar to a writ of certiorari, in that it requires such court or person to certify as to an alleged omission in a transcript, and, if true, to transmit to the appellate court a certified copy thereof (B. & C. Comp. § 554), and hence the issuing of the rule must necessarily be a matter of sound discretion.

At common law the Court of King's Bench had a general supervision over inferior tribunals, and might not only award a certiorari to a court of inferior jurisdiction, but also to persons invested with power to decide on the rights of parties. In the absence of a statute, the inherent power over inferior tribunals which was lodged in the Court of King's Bench in England is exercised by the courts of superior jurisdiction in the United States: 4 Enc. Pl. & Pr. 12, 14. In *State v. Orrick*, 106 Mo. 111 (17 S. W. 176, 329), it was held that the issuance of a writ of certiorari to correct a record on appeal was discretionary, the court saying: "No showing was made by defendant by affidavit or by other evidence that the transcript was incorrect. The writ does not issue as a matter of right, on mere suggestion of defects. The application should have been supported by evidence that the record was defective." In *Curry v. Woodward*, 50 Ala. 258, it was ruled that a certiorari would not be awarded by the supreme court, at the instance of the appellant, to bring up pleadings alleged to have been omitted from the transcript, in the absence of a showing as to the contents of the omitted papers, or the time when the moving party discovered the defects in the record, or the diligence exercised by him in attempting to cure the imperfections.

2. In appeals from judgments given in justice's courts, the discretion of the circuit court in the issuance of a rule to correct omissions in a transcript is not restricted by statute, and its refusal in the case at bar to require the

justice to attach to the transcript the original papers filed with him cannot be reviewed, except for an abuse of the inherent power with which it is invested. It was the duty of the defendants to secure from the justice and file with the clerk of the circuit court a sufficient transcript on appeal, and the failure to do so is presumably attributable to their neglect. Though a superior court may on its own motion award a certiorari to correct a transcript when an inspection thereof discloses that important parts of the record have been omitted, the general rule is that it will not do so when by the failure or neglect of the appellant the transcript is too imperfect to show affirmatively the grounds of error on which he intends to rely: *Fisher v. McNulty*, 30 W. Va. 186 (3 S. E. 593).

3. In *Scribner v. Gay*, 5 Mich. 511, it was held that though, on a proper showing, an appellate court will compel bills of exceptions to be corrected so as to conform to the facts, it will not do so until it is shown that mistakes exist which are injurious to the party applying for the corrections, the court saying: "But until affidavits are presented establishing the existence of mistakes injurious to the applicant, it would, in our view, be highly improper to interfere." In the case at bar an inspection of the transcript filed in the circuit court would have shown that the original papers filed with the justice were not attached, but as no affidavit was filed by the defendants, showing that the omissions were injurious, or attempting to excuse their neglect, or disclosing when they first became aware of the defect, the trial court did not, in our opinion, abuse its discretion in refusing to permit an amendment of the record.

4. It is contended by defendant's counsel that an error was committed in rendering judgment against their clients for costs. The power of the circuit court to give any other judgment than that of a dismissal must rest on its having jurisdiction of the appeal. It will be remembered that the

statute confers on the circuit court jurisdiction of an appeal from a judgment given in a justice's court upon the filing of a transcript, which must contain a copy of all the material entries in the justice's docket relating to the cause, and have annexed thereto all the original papers pertaining to the appeal, before it becomes "a transcript of the cause." The statutory requirement that only material entries made in the justice's docket are to be transcribed and sent up to be filed with the clerk of the circuit court presupposes the omission of unimportant memoranda, though entered in such docket. A justice of the peace being authorized to omit unessential minutes from the copy of the record, it is not to be supposed that the legislative assembly intended that, because of his inability to distinguish between material and immaterial entries in his docket, jurisdiction of the appeal was to be deferred on that account. To assume that an appeal should be dismissed because of such error is to concede that the statute prescribing what shall constitute a transcript of the cause was designed as a trap to defeat the rights of an appellant. We think there can be no doubt that, notwithstanding a failure to make a copy of all the material entries in the justice's docket relating to an appeal, the circuit court will not be deprived of jurisdiction; and, this being so, no reason exists why the right to hear and determine a cause is not conferred when a copy of the record sent up does not have attached thereto some of or all the original papers pertaining to the case that were filed with the justice.

Appeals from judgments given in justice's courts are tried *de novo* in the circuit court (B. & C. Comp. § 2246). and much weight must be attached to the pleadings filed in the inferior tribunal; but the all-important step in the procedure that confers jurisdiction of the appeal, as we view it, is the filing, within the time prescribed by law, of what might reasonably be considered a transcript of the cause,

showing the rendition of a judgment complained of, a notice of appeal, an undertaking therefor, and the allowance thereof, or, in other words, the filing of a copy of the material entries in the justice's docket. An appeal from a judgment rendered by the circuit court having been perfected, the appellant, within thirty days thereafter, is required to file with the clerk of the supreme court a transcript or an abstract of so much of the record as may be necessary to present intelligibly the questions to be decided, etc., "and thereafter the appellate court shall have jurisdiction of the cause, but not otherwise": B. & C. Comp. § 553. When it appears to the satisfaction of the supreme court that the transcript filed is incomplete in any particular substantially affecting the merits of the judgment or decree appealed from, the omission may be corrected by a rule upon the clerk of the court below: B. & C. Comp. § 554. If it were not that the latter section modifies the preceding, it is quite probable that as the supreme court secures jurisdiction of an appeal in the manner prescribed, but "not otherwise," a failure strictly to comply with the statutory requirements would prevent jurisdiction of an appeal from ever attaching. The statute regulating appeals from judgments given in a justice's court does not provide that jurisdiction shall be conferred in the manner prescribed but "not otherwise," and, in the absence of the quoted words, we think that when a proper notice of appeal has been given or served, and the appellant makes an honest effort to give an undertaking on appeal, and files with the clerk, within the time limited, what might reasonably be considered a transcript of the cause, the circuit court has jurisdiction, and may, in its discretion, by rule on the justice, correct any omissions in the record, even to the supplying of the entire original papers relating to the appeal that have been filed with the justice.

5. In the case at bar these several steps in the procedure were taken, and, believing from an inspection of the transcript that appellant's effort to perfect the appeal was honest, the circuit court secured jurisdiction of the cause, and was authorized to award a recovery of costs, which judgment is affirmed. AFFIRMED.

Argued 19 October, decided 5 December, 1904.

HARLOW v. OREGONIAN PUBLISHING CO.

[78 Pac. 737.]

CONTRACT FOR SERVICES — CONSTRUCTION.

1. Where a newspaper carrier route contract required the carrier to deliver the paper to all paying subscribers within a designated territory, to endeavor to increase its circulation, to collect subscriptions, and to pay weekly for all papers taken from the office, receiving as compensation for his labor a certain proportion of the subscription price of the papers, and declared that the relation should continue until one party or the other considered a separation necessary, and, if the parties were then unable to agree on a proper method of doing so, arbitrators should be appointed, either party could terminate the contract at his election, subject to liability to the other for such damages as resulted therefrom.

INJUNCTION AGAINST BREACH OF CONTRACT — REMEDY AT LAW.

2. Where a newspaper carrier route contract provided for arbitration on the termination of the same by either party, and the carrier could obtain adequate redress by the recovery of damages for breach thereof, he was not entitled to an injunction restraining the termination or breach of the contract.

SPECIFIC PERFORMANCE — MUTUALITY.

3. A contract requiring the rendition of personal services of an unusual and personal nature dependent on experience and judgment, will not ordinarily be specifically enforced, and, conversely, the other party will not be enjoined from terminating the contract, both parties being left to their actions for damages.

From Multnomah: JOHN B. CLELAND, MELVIN C. GEORGE, and ALFRED F. SEARS, JR., Judges, in joint session.

Statement by MR. JUSTICE BEAN.

Suit by F. E. and L. A. Harlow against the Oregonian Publishing Company and H. L. Pittock. On April 11, 1864, the defendant Pittock, at that time the owner and proprietor of the *Daily Morning Oregonian*, entered into the following written contract with one Myron M. Southworth:

"A memorandum of an Agreement made this 11th day of April, A. D. 1864, between Henry L. Pittock, of the City of Portland, Oregon, and Myron M. Southworth, of the same place, that the said Henry L. Pittock has for the sum of \$350 to be paid in weekly installments of \$5.00 each, sold and transferred to the said Myron M. Southworth the sole right and privilege to carry and collect subscriptions for the *Daily Morning Oregonian* newspaper in all that portion of said city south of Alder Street; that the said Myron M. Southworth is to have one third of the subscription price of the said newspaper for his labor, with the privilege of selling his interest therein to a suitable party, and cannot otherwise be deprived of the advantages and benefits of this contract, although the said newspaper may change hands, unless he wilfully neglects or refuses to fulfill his portion of said contract and that said Myron M. Southworth agrees to carry faithfully and carefully the said newspaper to every paying subscriber in said district for the above-named compensation, to endeavor to increase its circulation on all occasions, to procure as much advertising patronage for it as possible without any percentage, to enter into no contract with any other newspaper published in this city without permission of the proprietor of said newspaper; to be responsible and pay weekly for all papers taken from the office and to comply with all rules and regulations not directly contrary to the above agreement the proprietor may from time to time, as he thinks proper, to adopt for the benefit of said newspaper.

It is also agreed that in case either party considers separation necessary and both cannot agree upon a proper method of doing so, each shall appoint a man to act for him; if they cannot agree they shall have power to call on a third man whose decision shall be binding. The said M. M. Southworth binds himself to carry the said paper for 12½ cents for each subscriber weekly, whether the subscription price be raised or not.

Henry L. Pittock,
Myron M. Southworth."

Southworth carried and delivered the paper, collected subscriptions, and otherwise fulfilled the obligations of

his contract, until May 25, 1865, when he sold and assigned his interest therein to Ballard & Sappington. They performed the contract for some time, and then sold to other parties; and thus, through successive sales and purchases, it came to John Harlow in 1868. Harlow in turn carried out the contract, complying with all its terms, until his death, in 1882, when he bequeathed it to his son, the plaintiff F. E. Harlow. On the 27th of September, 1898, F. E. Harlow sold to his co-plaintiff an undivided one third interest therein. In February, 1873, the Oregonian Publishing Company succeeded to the rights of Pittock in the newspaper. During the period from the date of the Southworth contract, in 1864, until September 18, 1901, with the knowledge, consent, and acquiescence of the defendants, Southworth and his various assignees, including the plaintiffs and their father, delivered the paper and collected subscriptions in all that portion of the City of Portland south of Alder Street.

On September 18, 1901, the defendant publishing company notified the plaintiffs, in writing, that it had decided to confine their operations under the Southworth contract to the territory south of Alder Street which was embraced within the corporate limits of Portland at the time the contract was made in April, 1864, and that on and after November 4th following it would place other carriers in the territory theretofore covered by plaintiffs, but which was not included within such boundaries. This suit was thereupon immediately commenced by plaintiffs to enjoin and restrain defendants from refusing to furnish them papers to deliver to subscribers residing south of Alder Street, but outside the boundaries of the city as they existed in 1864, and also to enjoin and restrain defendants from undertaking on their own behalf to deliver papers or collect subscriptions in the disputed territory, on the ground that such territory was embraced within the terms of the South-

worth contract. A demurrer to the complaint was overruled, and defendants answered. On April 1, 1902, but before the trial, the defendant publishing company served written notice on the plaintiffs that on and after June 7, 1902, it would cease to sell or deliver the *Morning Oregonian* to them or their agents or representatives for delivery to subscribers within that part of the city south of Alder Street, and that it would, from and after the date mentioned, deliver or cause the papers to be delivered to subscribers residing within such territory. The plaintiffs thereupon filed a supplemental complaint, setting out the repudiation and threatened breach of the contract by the defendants, and praying for an injunction restraining them from refusing to comply with the Southworth contract, and from delivering papers or causing them to be delivered to subscribers residing within the district covered by such contract. A demurrer to the supplemental complaint was overruled. Defendants answered, admitting the service of the notice, and that it claimed the contract to be void, but denying the other allegations therein. The cause was tried upon the pleadings and evidence, and a decree entered dismissing the suit, from which the plaintiffs appeal.

AFFIRMED.

For appellants there was an oral argument by *Mr. William Wick Cotton* and a brief over the names of *Benton Killin*, *William D. Fenton*, and *W. W. Cotton*, to this effect.

I. This arbitration clause is not revocable at the pleasure of the parties. It is a part of a contract that has been continuously executed since 1864 until the defendants, in 1901, refused to recognize its terms as to all the territory embraced therein. The submission relates to the termination of a partly executed contract, and distinctly provides that the only thing to be considered under the submission is determination of the contract or method by which it

shall be effected, and of necessity the amount, if anything, payable by one to the other in satisfaction of the mutual obligations and rights of the parties: *Lewis' Appeal*, 91 Pa. St. 359; *McKenna v. Lyle*, 155 Pa. St. 599 (35 Am. St. Rep. 910); *Hood v. Hartshorn*, 100 Mass. 117; *Palmer v. Clark*, 106 Mass. 373-389; *Haley v. Bellamy*, 137 Mass. 357; *Sweet v. Morrison*, 116 N. Y. 19 (15 Am. St. Rep. 376); *Herrick v. Belknap*, 27 Vt. 673.

II. While equity will, as a rule, decline to decree specific performance of a contract requiring the performance of varied and continuous acts, the enforcement of which would unduly tax the attention and superintendence of the court, yet this general rule is subject in its application to many limitations that arise out of particular cases in which the remedy afforded by the law is inadequate and incomplete, and in any event it will restrain interference and enjoin violation: *Western Union Tel. Co. v. Union Pac.* 3 Fed. 423; *Western Union Tel. Co. v. St. Joseph & W. R. Co.* 3 Fed. 434; *Wells, F. & Co. v. Northern Pac. Ry. Co.* 23 Fed. 4 (10 Sawy. 441, 18 Am. & Eng. R. Cas. 441); *Chicago & A. Ry. Co. v. New York L. E. & W. Ry. Co.* 24 Fed. 516; *Franklin Tel. Co. v. Harrison*, 145 U. S. 460; *Union Pac. Ry. Co. v. Chicago, etc., Ry. Co.* 163 U. S. 600; *Standard Fashion Co. v. Siegel-Cooper*, 157 N. Y. 60 (43 L. R. A. 854, 68 Am. St. Rep. 749); *Burlington v. Burlington Water Co.* 86 Iowa, 266; Bispham, *Equity* (5 ed.), p. 577; *Nordenfelt v. Maxim Nordenfelt Gun Co.* 63 Law Jour. Rep. Ch. 908 (6 Eng. Rul. Cas. 413); *Park v. Richmond & I. Tpk. Co.* 1 L. R. A. 198; *Appeal of Cornwall & L. R. Co.* 125 Pa. 232 (17 Atl. 427, 11 Am. St. Rep. 889); *Callery v. New Orleans Water Works*, 35 La. Ann. 798; *South Port. Land Co. v. Munger*, 36 Or. 457 (60 Pac. 5).

III. Even though the contract be classed with those of a strictly personal character, the rules governing and applicable to such contracts do not obtain where the intent

of the parties is expressed in such contract and takes from them their personal character: *Devlin v. May*, 63 N. Y. 8; *Carter v. State*, 8 S. Dak. 153 (65 N. W. 422); *Sloan v. Williams*, 138 Ill. 46; *Sunday Mirror Co. v. Galvin*, 55 Mo. App. 421; *Alford v. Smith*, 5 Pick. 232; *Wild v. Davenport*, 48 N. J. L. 129 (57 Am. Rep. 552); *Robbins v. Butler*, 24 Ill. 387; *Phillips v. Blachford*, 137 Mass. 510.

For respondents there was a brief over the name of *Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. Rufus Mallory*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. Assuming, for the purposes of the opinion, that the plaintiffs have legally succeeded to the rights of Southworth under the original contract, and stand in his place and stead, entitled to all the rights and privileges given him by its terms, and that it embraces all the territory claimed by them, there are two reasons why this suit could not be maintained after the repudiation of the entire contract by the defendants, and the service on the plaintiffs of notice to that effect in June, 1902: *first*, the plaintiffs, if they are entitled to any relief at all, have a full and complete remedy at law; and, *second*, the remedy by injunction or specific performance is not mutual. It could not be invoked by the defendants against the plaintiffs, as the contract is not, and never was, capable of being specifically enforced or enjoined at the suit of Pittock or the defendant publishing company. The contract between Pittock and Southworth created substantially the relation of employer and employé, and this relation continued as to those who succeeded to Southworth's interest. By its terms Southworth (whom we shall hereafter assume includes parties who have legally succeeded to his rights), was to carry and deliver the paper to all paying subscribers within the designated territory, to endeavor to increase its circulation, to collect subscriptions therefor, and to

pay weekly for all papers he took from the office, receiving as compensation for "his labor" a certain proportion of the subscription price of the paper. This relationship was to continue until one party or the other considered a "separation necessary." In that event, if the parties were unable to agree upon "a proper method of doing so," each was to appoint one arbitrator, who, if they could not agree, should choose another, whose decision should be final. There may be room for controversy as to the intent and meaning of the arbitration clause, but it seems to us that it was intended, in case either party should desire to terminate the contract, to provide a simple and inexpensive method or means by which its value to the other could be determined, and the amount to be paid, if any, by the one desiring the separation, ascertained. The contract was undoubtedly thought to be advantageous to both parties at the time it was made. Southworth paid \$350 for the sole right to carry and deliver the papers, and to receive as a compensation therefor a certain portion of the subscription price. This he supposed to be a valuable right, and one which would increase largely in value, according to his industry and diligence in extending the circulation of the paper, and the character of the services which he should render to its patrons. Pittock, on the other hand, was contracting for the future circulation of his paper, and the collection of subscriptions therefor in the given territory, and this he undoubtedly believed to be of value to the paper. It was to protect these rights, and to prevent the termination of the contract by either without making compensation to the other, that the arbitration clause was inserted. This, it appears to us, is its true intent and meaning.

We cannot think, however, that the agreement contemplated that the personal relationship between the parties should necessarily continue, against the will of either,

until the amount of compensation should be ascertained in the manner therein provided. Either party could terminate the contract when he considered it necessary, but, if the parties were unable to agree as to the amount of compensation to be paid by one to the other on account of such separation, they were to submit that matter to arbitration, but not the right to terminate the contract. The provision as to the duration of the contract, and the method to be employed in separation, or for determining the value in case separation should be deemed necessary, did not prevent either party from dissolving the relation between them at any time, subject to liability to the other for such damages as he may have sustained if it was not done in the manner provided. The contract created such a relationship of trust and confidence between the parties that a court of equity will not compel a continuation thereof against the will of either, but will leave the injured party to his relief at law. The contract, by its terms, was subject to termination at any time; the party desiring the termination, however, to pay its value to the other. If the termination or separation took place in the manner provided, the value or amount to be paid would be ascertained and determined by arbitrators. If not, the party guilty of the breach would be liable in an action at law for damages, the same as for the breach of any other contract.

2. It follows, therefore, that whether the action of the defendant corporation in repudiating the contract and notifying the plaintiffs that it would no longer be bound thereby be deemed a separation within its terms, or a breach thereof, the effect was to terminate the contract; and the only question between the parties remaining for adjustment is the amount, if any, to be paid by the defendants to the plaintiffs on account of such separation or breach. That question is not cognizable by a court of

equity. An injunction to restrain the breach of a personal contract, or one relating to personal property, or a mandatory injunction to compel specific performance of such a contract, will not be granted when the recovery of damages at law would adequately redress the impending injury: *Chicago & A. R. Co. v. New York, Lake Erie & W. R. Co.* (C. C.) 24 Fed. 516; *Richmond v. Dubuque & Sioux City R. Co.* 33 Iowa, 423; *Port Clinton R. Co. v. Cleveland & Toledo R. Co.* 13 Ohio St. 545; 26 Am. & Eng. Enc. Law (2 ed.), 17. Indeed, the basis of equitable interference in cases of specific performance is a want of an adequate remedy at law. Mr. Waterman says: "A court of equity will not grant relief where the complaining party will not be deprived of any legal right by withholding it, unless he can show clearly that he is entitled to the relief sought. If the plaintiff has an adequate remedy at law, he must seek his redress there": Waterman, Spec. Perf. § 9. The same rule is laid down by Judge Story, Mr. Fry, and Mr. Pomeroy: 1 Story, Equity (10 ed.), § 716; Fry, Spec. Perf. § 12; Pomeroy, Spec. Perf. (2 ed.) § 24.

It is admitted, as we understand it, that a court of equity will not decree a specific performance of the contract in suit because it requires varied and continuous acts on the part of the defendants, but it is argued that it will enjoin the defendants from violating the contract by delivering papers, or causing them to be sold and delivered, within the territory embraced in plaintiffs' contract, until such time as the defendants take the proper steps provided in the contract for its termination. Although the remedy suggested is negative rather than affirmative, it is, in effect, a decree for the performance of the contract. Enjoining the defendants from delivering papers or causing them to be sold and delivered in the disputed territory would practically enforce the contract, and require them to furnish

the papers to the plaintiffs to be so delivered. A prohibition preventing a violation of the contract by the defendants would in this case as effectually compel its performance as an affirmative order to that effect. The leading case holding that, although a court of equity cannot compel the specific performance of a personal service contract, it may enjoin a violation of the negative provisions thereof, is that of *Lumley v. Wagner*, 1 De Gex, M. & G. 604. In that case the defendant had agreed with plaintiff to sing at his theater for a definite time, and not to sing elsewhere. She threatened to sing at another theater in violation of her contract. In a suit to enjoin her from so doing, the court held that it could not enforce the affirmative part of the contract, because it could not compel the defendant to sing, but it could and would enjoin and restrain her from singing elsewhere. In this case the contract was for a definite, fixed time, and plaintiff's remedy at law was manifestly inadequate, because the damages which would accrue to him by a violation of the contract by the defendant could not be ascertained with any certainty. The same is true of *Singer Sewing Machine Co. v. Union Buttonhole Co.* 1 Holmes, 253 (Fed. Cas. No. 12904); *Standard Fashion Co. v. Siegel-Cooper Co.* 157 N. Y. 60 (51 N. E. 408, 43 L. R. A. 854, 68 Am. St. Rep. 749); *Burlington v. Burlington Water Co.* 86 Iowa, 266 (53 N. W. 246), and other cases cited by the plaintiffs.

4. We are therefore of the opinion that plaintiffs cannot maintain this suit, for the reasons stated. There is, however, another objection to the enforcement of the contract in equity at the suit of the plaintiffs, and that is because the remedy is not mutual, and defendants could not compel the plaintiffs to perform. It is a fundamental rule of equity that when, from the nature of the contract, it is incapable of being enforced against one party, that party is

rendered equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former. Unless a court of equity can execute the contract on both sides, it will generally not interpose in behalf of either party. To compel one to perform specifically, and send the other to a court of law to recover damages, would be in violation of the established principles of equity: Pomeroy, Spec. Perf. (2 ed.) § 165; Fry, Spec. Perf. § 286; Waterman, Spec. Perf. § 198; *Marble Co. v. Ripley*, 77 U. S. (10 Wall.) 339; *Richmond v. Dubuque & Sioux City R. Co.* 33 Iowa, 423; *Tyson v. Watts*, 1 Md. Ch. 13; *Hoover v. Calhoun*, 16 Grat. 109; *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346 (10 S. E. 239); 26 Am. & Eng. Enc. Law (2 ed.), 28. Now, as we have already stated, among the stipulations in the contract for performance by Southworth are that he shall carry the paper faithfully and carefully to every paying subscriber in the district; that he will endeavor on all occasions to increase the circulation, and will procure as much advertising patronage as possible; that he will be responsible and pay weekly for all papers taken from the office; and that he will comply with all rules and regulations that the proprietor of the paper may see fit to adopt from time to time, not inconsistent with his contract. These provisions call for the performance of varied and continuous acts on the part of Southworth, requiring skill, energy, experience, judgment, and integrity. It will not be contended, we think, that a court of equity can or will decree the specific performance of such a contract, because the enforcement of its decree would require such constant superintendence as to make judicial control a matter of extreme difficulty, if not an impossibility. See authorities last cited.

For these reasons, the decree of the court below should be affirmed, and it is so ordered.

AFFIRMED.

Argued 4 October, decided 12 December, 1904; rehearing denied 15 May, 1905.

SCOTT v. FORD.

[78 Pac. 742, 80 Pac. 899, 68 L. R. A. 469.]

RECOVERING MONEY PAID UNDER MISTAKE OF LAW OR ERROR OF FACT.

1. Money paid under a mistake of law, with knowledge of all the facts, no deceit or undue importunity intervening, cannot be recovered; but if paid under an error of fact, not arising from the intentional neglect of the party to inquire, even if accompanied by a mistake as to the law or ignorance of it, a recovery may be had.

IDEM. — In an action to recover money paid by executors to one whom they supposed entitled to receive it under the will, a finding that the money was paid to defendant under the belief that she was entitled to it as a child of her deceased father under the will, does not sustain a judgment of recovery, as it discloses only a mistake of law unaffected by any act of the defendant.

IDEM. — In such a case a finding that the evidence does not show whether plaintiffs had any belief or knowledge as to whether defendant's father was alive at the time the will was executed or at the time of testator's death, does not support a judgment for plaintiff on the ground of an error of fact, for it does not show that the plaintiffs were mistaken as to the truth.

FINDINGS BY SUPREME COURT IN LAW ACTIONS.

4. Where different inferences may be drawn from the evidence, the supreme court cannot make findings of fact on appeal in a law action, nor substitute one finding for another.

ASSIGNING ERROR AS TO RULING ON MOTION.

5. Error is not assignable on the ruling of the court on a motion for judgment dismissing an action based on the pleadings, evidence, and stipulations of fact.

RECOVERING MONEY PAID UNDER MISTAKE OF FACT.

6. Money honestly paid in ignorance or forgetfulness of the facts, or under a clearly proven, genuine mistake as to the truth, may be recovered.

RIGHT OF SUPREME COURT TO ENTER JUDGMENT ON FINDINGS.

7. Where the findings of fact by the trial court in a law action will not support a judgment for either party, the only course left for the supreme court is to send the case back.

APPEAL — MAKING FINDINGS ON CONFLICTING EVIDENCE.

8. Where the evidence in the record on appeal in a law action is such that different inferences and deductions may reasonably be drawn therefrom, the supreme court cannot revise the findings or make new ones.

CONSTRUCTION OF CONFUSED CONCLUSION.

9. A conclusion of law that "the sum so paid to defendant as a legatee under the will * * was erroneously paid," is a conclusion of law and not a finding of fact.

From Lane: JAMES W. HAMILTON, Judge.

Action by George W. Scott and H. A. Hammond, as executors of the last will and testament and estate of Church Sturtevant, deceased, against Eva Ford, formerly Eva Stephens.

The complaint herein is, in substance, as follows: That on December 30, 1888, Church Sturtevant made his will; that on December 18, 1894, he made a codicil thereto, reciting that by said will he had bequeathed to his daughter, Mrs. Stephens, a certain share of his estate, and that, she now being dead, he therefore bequeathed to her five children equally the share set apart to her in the will; that at the time of the execution of said codicil, Mrs. Stephens, whose given name was Mary Jane, was dead, and left surviving her five children, and no more; that Church Sturtevant subsequently died; that said will and codicil were duly admitted to probate in the county and probate court for Henry County, State of Illinois, and that plaintiffs were appointed executors; that the defendant, Eva Ford, is a grandchild of Mary Jane Stephens, being the daughter of Hosea Stephens, her son; that Hosea died in Lane County, Oregon, long prior to the death of Mary Jane, and prior to the time of the execution of the codicil; that at the time of their appointment and qualification as executors, and while plaintiffs were so acting, and at the times and dates that the money was paid to and received by defendant and her guardian, as hereinafter alleged, plaintiffs were informed and believed that said Hosea Stephens was one of the legatees named in said codicil, and was entitled to receive the legacy named in said codicil at the time of his death; that said Hosea was alive at the time said codicil and will were executed and at the time of the death of the testator, and that said Eva Ford, then Eva Stephens, was then entitled to receive the said money paid to her as daughter and heir of said Hosea; that plaintiffs did not know at the time that said money was paid that said Hosea Stephens was not living at the time said codicil and will were executed, and did not know that he was not living at the time of the death of the testator, and did not ascertain the fact that he was not

named and referred to in said will and codicil as one of the legatees therein, and that he was not entitled to receive said legacy mentioned therein, and that the defendant was not entitled to receive the same until after said money was paid; that on and prior to the 1st day of January, 1900, plaintiffs were informed and believed that defendant was entitled to receive an equal one sixth of the bequest mentioned in the codicil; that plaintiffs paid to defendant, through her guardian, \$600 on March 31, 1900, \$600 on September 5, 1900, and to the defendant in person \$600 on March 27, 1901; that the said information and belief of said executors as to defendant's being entitled to any portion of said bequest was and is erroneous, and that the money was paid to her through their mistake. Other formal allegations follow, with a prayer for the recovery of the amount so paid to defendant, with interest and costs.

The answer admits the allegations touching the execution of the will and codicil, their admission to probate, the appointment of plaintiffs as executors, the death of Mrs. Stephens at the time of the execution of the codicil, the subsequent death of Church Sturtevant; that Eva Ford is the grandchild of Mrs. Stephens, being the daughter of Hosea Stephens, her son; that Hosea died long prior to the death of Mrs. Stephens, and prior to the execution of the codicil and the payment of the money to Eva and her guardian; but specifically denies all else.

Under these issues a trial was had before the court, a jury being waived, resulting in findings of fact and law as follows, omitting the first finding, which relates to the payment of the money by plaintiffs to defendant, which is admitted:

Second. "That the said payments were so made by plaintiffs to defendant under the belief that as a child of one Hosea Stephens said defendant would be entitled to said

sums of money under and by the terms and provisions of the codicil to the will of Church Sturtevant, which terms are set forth in the amended complaint of plaintiff.

Third. "That the Mary Jane Stephens referred to in the codicil of said will of Church Sturtevant as Mrs. Stephens died April 23, 1893.

Fourth. "That the children of the said Mary Jane Stephens living at the time of her death, and at the time of making the codicil to the will of Church Sturtevant, and at the time of the death of Church Sturtevant, are Lucy Stephens, Clark Stephens, Church Stephens, Joseph Stephens, and Lettie McCutcheon.

Fifth. "That Hosea A. Stephens was a child of said Mary J. Stephens; that Hosea died December 13, 1882, leaving surviving him a daughter, who is the defendant herein.

Sixth. "That it does not appear from the evidence that plaintiffs, or either of them, had any belief or knowledge as to whether the said Hosea was living at the time of the execution of said codicil to said will; nor that plaintiffs, or either of them, believed that said Hosea was living at the time of the death of said Church Sturtevant, the testator in said will."

As conclusions of law, based on the foregoing findings of fact, I find as follows:

First. "The sum of eighteen hundred dollars so paid by plaintiffs to defendant as a legatee under the will hereinbefore referred to was erroneously paid to defendant.

Second. "That by the terms of the said codicil of said will defendant was not entitled to said sum of money so paid her, nor any part thereof.

Third. "That the withholding said moneys from plaintiffs by defendant is wrongful.

Fourth. "That plaintiffs are entitled to recover a judgment against the defendant for the sum of eighteen hundred dollars, with interest thereon from April 5, 1902, at the rate of six per cent per annum, amounting to (\$1,995.90), and plaintiff's costs herein incurred."

Based upon these findings, a judgment was rendered for plaintiffs, from which the defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Tilmon Ford*, *William M. Kaiser*, and *Woodson T. Slater*, with an oral argument by *Mr. Ford* and *Mr. Slater*.

For respondent there was a brief and an oral argument by *Mr. L. Bilyeu* and *Mr. A. C. Woodcock*.

MR. JUSTICE WOLVERTON delivered the opinion.

Plaintiffs base their action upon the principle that when one pays money which he is neither morally nor legally bound to pay, under a mistake as to his legal obligations and duty, and which the recipient has no right in good conscience to retain, the former may recover it back in an action of *indebitatus assumpsit*, whether his mistake be one of law or of fact. The trial court must have sustained this principle as sound, else its conclusion of law could not follow from the facts found. The defendant contends that the true principle is that money paid with knowledge of the facts, without fraud or deceit, under a mistake of law, cannot be recovered back, which principle she insists is alone applicable in determining the controversy.

1. The question involved is an ancient one, and has provoked much disputation, but the trend of modern authority is strongly in one direction, favorable to the theory that a mistake of law, within proper limitations, does not excuse, and that money paid under such mistake cannot be recovered back. There are two legal maxims involved in the inquiry, namely, *Ignorantia facti excusat*, *ignorantia juris non excusat* (Ignorance of fact excuses, ignorance of the law does not excuse); and *Volenti non fit injuria* (that to which a person assents is not esteemed in law an injury): Broom, *Legal Maxims* (8 ed.), *253, 268. As to the latter Mr. Broom says (*272): "There is also a

large class of cases in which it has been held that money paid voluntarily cannot be recovered, although the original payment was not required by any equitable consideration; and these cases are very nearly allied in principle to those which have been considered in treating of a payment made in ignorance of the law." We will therefore turn our attention more directly to the common understanding in legal thought of the former maxim.

It is axiomatic, also, that "every man is presumed to know the law," and of this "ignorance of the law does not excuse" is but a sequence. From these, coupled with that as to ignorance of fact, Mr. Broom derives the two following propositions: "*First*, that money paid with full knowledge of the facts, but through ignorance of the law, is not recoverable, if there be nothing unconscientious in the retaining of it; and, *secondly*, that money paid in ignorance of the facts is recoverable, provided there have been no laches in the party paying it, and there was no ground to claim it in conscience." The qualification of the principle involved by the first deduction, namely, "if there be nothing unconscientious in retaining it," is traceable to dicta of Lord Chief Justice DE GREY in *Farmer v. Arundel*, 2 W. Bl. *824, and Lord MANSFIELD in *Bize v. Dickason*, 1 D. & E. 285. This has been shown by elaborate and well-considered cases, both in England and this country. The observation of Lord Chief Justice DE GREY was that, "When money is paid by one man to another as a mistake either of fact or of law, or by deceit, an action will certainly lie to recover it back." This is a positive affirmation, stripped of any qualification as to conscience, that money, though paid under mistake of law, may be recovered back. But it is said that in the case wherein the announcement was made the action was not sustained, although the money had been paid by the plaintiffs under a clear mistake of law. Lord MANSFIELD's proposition was that, "Where

money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action" (*assumpsit*.) We are left in doubt as to whether the great jurist meant mistake of law or of fact. Mr. Justice GIBBS, who wrote the prevailing opinion in *Brisbane v. Dacres*, 5 Taunt. 144, infers with convincing force, from circumstances attending the utterance and others occurring later, that he meant the latter. See *Clarke v. Dutcher*, 9 Cow. 674, where this view was subsequently maintained.

Brisbane v. Dacres, 5 Taunt. 144, is one among the first cases bearing upon the question, and is most elaborately and learnedly considered. The case was this: The captain of a king's ship brought public treasure home in her, upon the public service, and treasure of individuals, for his own emolument. He received freight for both, and paid over one third of it, according to established usage in the navy, to the admiral under whose command he had sailed. Discovering, however, that the law did not compel captains to pay to admirals one third of the freight, he brought an action as for money had and received to recover it back from the admiral's executrix, and it was held that as to the public freight he could not recover the money back. Mr. Justice GIBBS, after stating the facts, makes use of this significant and unmistakable language: "We must take this payment to have been made under a demand of right, and I think that where a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover back the sum he has so voluntarily paid. It may be that upon a further review he may form a different opinion of the law, and it may be his subsequent opinion may be the correct one. If we were to hold otherwise, I think many inconveniences may arise. There are many doubtful questions of law. When they arise the

defendant has an option either to litigate the question, or to submit to the demand, and pay the money. I think that by submitting to the demand he that pays the money gives it to the person to whom he pays it, and makes it his, and closes the transaction between them. He who receives it has a right to consider it as his without dispute. He spends it in confidence that it is his; and it would be most mischievous and unjust if he who has acquiesced in the right by such voluntary payment should be at liberty, at any time within the statute of limitations, to rip up the matter, and recover back the money. He who received it is not in the same condition. He has spent it in the confidence it was his, and perhaps has no means of repayment." Here are brought to the service of the jurist both of the legal maxims first above alluded to, which seem to suggest a sound conclusion. Then he discusses the dicta of Lord Chief Justice DE GREY and Lord MANSFIELD, and, as if not to have his meaning misunderstood, reiterates: "I am therefore of the opinion this money cannot be recovered back. I think, on principle, that money which is paid to a man who claims it as his right, with a knowledge of all the facts, cannot be recovered back. I think it on principle, and I think the weight of the authorities is so, and I think the dicta that go beyond it are not supported or called for by the facts of the cases."

CHAMBRE, J., rendered a dissenting opinion, wherein he held that the money was not recoverable upon the ground that it was against conscience for the admiral's executrix to retain it. He says: "It seems to me a most dangerous doctrine that a man getting possession of money, to any extent, in consequence of another party's ignorance of the law, cannot be called on to repay it. Suppose an administrator pays money per capita in misapplication of the effects of the intestate, shall it be said that he cannot recover it back? It is said that may be remedied in equity.

This is an equitable action, and it would be of bad effect if it should not prevail in like cases." Lord MANSFIELD took part in this case also, concurring in the main opinion, and, to show the bent of his mind, after discussing other cases, he says: "The last case is *Bilbie v. Lumley*, 2 East, 469. Certainly it was not argued, but it is a most positive decision; and the counsel was certainly a most experienced advocate, and not disposed to abandon tenable points. My brother CHAMBRE put the case of an administrator paying away the assets in an undue course of administration. I know not that he could recover back money so paid. Certainly, if he could, it could be only under the principle *æquum et bonum*. There being, therefore, no case which has been argued by counsel wherein the distinction has been taken and in which this doctrine has been held, and as we do not feel ourselves called upon to overrule so express an authority as *Bilbie v. Lumley*, I am of the opinion that the defendant is entitled to retain this money." We have gone thus lengthily into this case to show the foundation for the general doctrine that money paid under a claim of right, with full knowledge of all the facts, but under a mistake or ignorance of law, cannot be recovered back, and to denote the questionable character of the foundation of the opposing doctrine, and we cite the discussions of Mr. Justice CHAMBRE and Lord MANSFIELD to indicate how uncertain, indefinite, and equivocal is the test whether, in the abstract, it be against conscience or not for the party receiving the money to retain it. CHAMBRE put a case much like the present, but thought the question of conscience would govern in determining the right to recover. Lord MANSFIELD doubted it, and they were directly opposed to each other as to the rule applicable to the facts of that case. A headnote to this case would seem to support Mr. Broom's deduction, but it does not state correctly the principle decided.

The earlier cases upholding the doctrine to which reference is made as authority are *Bilbie v. Lumley*, 2 East, *469, and *Lowry v. Bourdieu*, 2 Doug. 468. In this country there are three leading cases, adopting and promulgating the view of Mr. Justice CHAMBER in *Brisbane v. Dacres*. The first in point of time is *Lawrence v. Beaubien*, 2 Bailey (S. C.), 623 (23 Am. Dec. 155), which was an action upon a bond given by defendant, an unnaturalized citizen, as a consideration for a deed conveying certain real property in trust for himself, which had previously been devised to him, he having been illy advised that the law would not permit him to hold real property, being an alien, and it was held, in effect, that relief will be granted against a mistake of law, and a contract made under such mistake, though with full knowledge of the facts, be set aside in cases where neither party has acquired a right or suffered a loss by such contract. A distinction is drawn between ignorance of the law and mistake of law, but the decision is put upon the alternative of adopting the doctrine of *Bilbie v. Lumley* and *Brisbane v. Dacres*, or, on the other hand, that maintained by *Lansdown v. Lansdown*, Mosely, 364 (an authority very much discredited by Lord MANSFIELD), *Bingham v. Bingham*, 1 Ves. Sr. 126, and the dicta in *Farmer v. Arundel* and *Bize v. Dickson*; and it was determined against the principle as embodied in the maxim that ignorance of the law does not excuse. It should be remarked that it was not a decision announcing an exception to the general rule, but laying down a principle distinct and antagonistic thereto. The next case is *Culbreth v. Culbreth*, 7 Ga. 64 (50 Am. Dec. 375). The facts are that one Culbreth died, leaving neither widow nor children. His nearest of kin were seven surviving brothers and sisters and the children of a deceased sister. The administrator, under a misapprehension of the law, divided the estate equally between the seven brothers and sisters, to the ex-

clusion of the children of the deceased sister. The children having subsequently recovered against the administrator to the extent of one eighth of the estate, the latter sued two of the distributees to recover back the amount paid to them. The court held that "money paid by mistake of the law may be recovered back in an action for money had and received where there is a full knowledge of all the facts, provided that the mistake is clearly proven; and the defendant cannot, in good conscience, retain it." The result was again reached by a review of the cases, where it was found that there was a parting of the ways as it respects that doctrine and that held to in *Bilbie v. Lumley*. The next case is *Northrop's Ex'rs v. Graves*, 19 Conn. 548 (50 Am. Dec. 264), very similar on the facts to the one at bar, wherein it was said that "When money is paid by one under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back in an action of *indebitatus assumpsit*, whether such mistake be one of fact or of law." The court bases the right of action upon the principle stated by Lord MANSFIELD in *Moses v. Macferlan*, 2 Burr. 1005, that the action of *indebitatus assumpsit* lies for the recovery of money which *ex æquo et bono* ought to be paid over to the plaintiff. The action is said to be equitable in its nature, and, of course, comprises cases where the defendant cannot in good conscience retain the the advantage he has obtained. With the principle there can be no quarrel, and the action set forth is brought every day, having nothing further upon which to found it; but the case under discussion took the broad distinction indicated by the earlier authorities, and it came again to the test as to which was the sounder rule, not that there was an exception to the general rule. Kentucky is in line with these cases: *Fitzgerald v. Peck*, 4 Litt. (Ky.) 125.

The leading case in this county upon the other side of the controversy is, perhaps, *Clarke v. Dutcher*, 9 Cow. 674 ; the court, speaking through Mr. Justice SUTHERLAND, saying that "Although there are a few dicta of eminent judges to the contrary, I consider the current and weight of authorities as clearly establishing the position that where money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not. (1) He shall not be permitted to allege his ignorance of law ; (2) and it shall be considered a voluntary payment." Another case is *Mowatt v. Wright*, 1 Wend. 355 (19 Am. Dec. 508), where it is said : "The action for money had and received, in general, lies for money which, *ex æquo et bono*, the defendant ought to refund as for money paid by mistake, or upon a consideration which happens to fail, or for money obtained by imposition, or extortion, or oppression, or by taking an undue advantage of the plaintiff's situation : 2 Burr. 1012. A mistake which entitles a party to sustain this action must be a mistake of fact. Where there is no fraud nor mistake in matter of fact, if the law was mistaken, the rule applies that *ignorantia juris non excusat* : Doug. 471. An error of fact takes place either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist." A later case is *Champlin v. Laytin*, 18 Wend. 407 (31 Am. Dec. 382), where it is held that mere mistake in law is not, in the absence of fraud, surprise, or undue influence, sufficient for relief in equity. In the course of an opinion by Mr. Justice BRONSON he affirms that "The civilians are divided on the question whether money paid under a mistake of law is liable to repetition. But it is the settled doctrine of Westminster Hall that money paid with a full knowl-

edge of the facts cannot be recovered back on the ground that the party was ignorant of the law." *Hurd v. Hall*, 12 Wis. 125, is a well-considered case by Mr. Chief Justice Dixon, wherein he defines a mistake of law thus: "A mistake of law happens when a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion of inference, arising from an imperfect or incorrect exercise of the judgment, upon facts as they really are; and, like a correct opinion, which is law, necessarily presupposes that the person forming it is in full possession of them." See, also, *Birkhauser v. Schmitt*, 45 Wis. 316 (30 Am. Rep. 740). But he sets forth another condition that does excuse, namely, an error of fact, and defines it also, stating the appropriate limitations to be observed as follows: "An error of fact—*ignorantia facti*—is ordinarily said to take place either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist. * * This ignorance of facts must be excusable; that is, it must not arise from the intentional neglect of the party to investigate them. The rule which formerly prevailed that if a party might, by the exercise of reasonable diligence, have ascertained the facts, he would not, on the ground of ignorance or mistake, be relieved from his contract, has of late been very much relaxed. The latter cases establish the doctrine that, wherever there is a clear *bona fide* mistake, ignorance, or forgetfulness of facts, the contract may, on that account, be avoided."

The general principle was early adopted by this court in *Johnson v. McCown*, 1 Or. 193. Many cases announce and apply it, and, indeed, it would seem that all the later cases are in unison touching the subject. We cite a few of them only: *Jefferson County v. Hawkins*, 23 Fla. 223 (2 South. 362); *Brewton v. Smith*, 28 Ga. 442; *White v. Rowland*, 67 Ga. 546 (44 Am. Rep. 731); *Egbert v. Rush*,

7 Ind. 706; *Erkens v. Nicolin*, 39 Minn. 461 (40 N. W. 567); *Peters v. Florence*, 38 Pa. 194; *Evans v. Hughes County*, 3 S. D. 244 (52 N. W. 1062); *Shriver v. Garrison*, 30 W. Va. 456 (4 S. E. 660). The Indiana case is of marked analogy to the one at bar on the facts, and has later had the tacit approval of the same court: *Stokes v. Goodykoontz*, 126 Ind. 535 (26 N. E. 391). The doctrine seems also to have the approval of the Supreme Court of the United States: *Hunt v. Rousmanier*, 26 U. S. (1 Pet.) 1; *Elliott v. Swartout*, 35 U. S. (10 Pet.) 137; *Bank of United States v. Daniel*, 37 U. S. (12 Pet.) 32. The learned authors of the American and English Encyclopedia of Law (vol. 20, 2 ed., 816), say: "It is one of the fundamental maxims of the common law that ignorance of law excuses no one. It is a maxim founded not only on expediency and policy, but on necessity"—giving as the basis for it the reason stated in *Hardigree v. Mitchum*, 51 Ala. 151, that, if ignorance of the law were permitted to prevail, the courts would be involved with well-nigh interminable inquiries and embarrassments, so that the administration of justice would become impracticable. The authors further say: "It is therefore applied most rigidly at law, and is only relaxed in equity where the mistake is mixed with misrepresentation or fraud, or where the ignorance of the complainant has conferred upon the defendant a benefit which he cannot in good conscience retain." So, in volume 15, at page 1102, they affirm that "Although a few of the earlier English decisions and some decisions in the United States maintain a contrary doctrine, the settled weight of authority is that money voluntarily paid in ignorance of law, without fraud or imposition, and with knowledge of all the facts, cannot be recovered back, either at law or in equity," citing cases from England, Canada, the Supreme Court of the United States, and the courts of twenty-six of the States of the Union.

It is unnecessary to go further with the authorities. That the action of *indebitatus assumpsit* will lie for money paid which in justice and good conscience ought not to be retained is well established, and of the earliest cases upon the subject is *Moses v. Macferlan*, hereinabove referred to, wherein Lord MANSFIELD announced the doctrine. The basis of the action is peculiar, in that there is no privity of contract between the parties; but the law implies a promise, hence that the form of action will lie: *Brand v. Williams*, 28 Minn. 238 (13 N. W. 42). But the question whether a person ought in equity and good conscience to pay over, or whether it is unconscientious for him to retain, what he has received from another, is a question dependent upon the facts of each particular case. The Latin maxim, *Ex æquo et bono*, most frequently applied in such cases, simply means "in justice and good dealing" (Bouv. Dict.), and what might be against conscience or contrary to justice and good dealing in one case and under one set of facts would not be in another. We may give some instances. Mr. Broom speaks of a case where A., a tenant of B., received notice from C., the mortgagee of B.'s term, that the interest was in arrear, and requiring the payment to her (C.) of the rent due. A., notwithstanding this notice, paid the rent to B., and was afterward compelled by distress to pay the amount over again to C. *Held*, that the money, having been paid to B. with full knowledge of the facts, could not be recovered back; citing *Higgs v. Scott*, 7 C. B. *63. Another case is where a party conveyed to another realty lying in a street under a mistake of law on the part of both that, if the street was ever opened by the municipality, the grantee would receive compensation therefor; relying upon a decision of the court that was afterward overruled, and it was held that no recovery could be had for the consideration thus paid for the premises

under such a mistake: *Champlin v. Laytin*, 18 Wend. 407 (31 Am. Dec. 382). So, in *Erkens v. Nicolin*, 39 Minn. 461 (30 N. W. 567), where one paid for a deed to lands which he already owned in ignorance of the rule of law that distances must yield to natural boundaries called for in a deed, and the court held that the money could not be recovered back. So, also, in *Evans v. Hughes County*, 3 S. D. 244 (52 N. W. 1062), where Evans paid the county for an exclusive ferry franchise which he and the county believed as a matter of law the county was empowered to grant; but, upon its being ascertained that the county had no such authority, and that Evans did not get what he supposed he was getting, an action was instituted to recover the money paid therefor, and the court said "No"; that the mistake was one of law, and that the action would not lie.

So the general rule is that one paying taxes voluntarily, without legal duress or coercion, cannot recover them back, and this applies although they be unconstitutional: 27 Am. & Eng. Enc. Law (2 ed.), 757, 758, and note 3 to 757. In the abstract, it was assuredly against conscience in any of these cases for the parties receiving the money to retain it, for they parted with no adequate or material consideration for it; yet, when connected with the facts of the cases, the courts say that, having paid voluntarily, with knowledge of the facts, but under a mistake of law, the money so paid is not recoverable, and, in effect, that it is not inimical to the maxim *Ex æquo et bono*, or against good conscience, for the one receiving to retain it. So, we may put a case very near to the one at bar. Suppose the children of Mrs. Stephens had been the executors of this estate, and had paid the money that has been paid by these executors to the defendant under a mere mistake of law, knowing the facts, how would the idea of good conscience or of justice and good dealing affect it? It would

be said at once that it was not unconscionable for her to retain it, and that no recovery could therefore be had. But in the abstract it would be just as wrong and just as violative of justice for her to retain the money in that instance against legal right, as to retain it against these executors. This is strongly illustrative that it is the fact that controls, and the error with relation thereto, and not a mistake as to the law; and the law will not imply a promise to repay unless there is mistake or ignorance as to the fact, or unless there is some fraud or deceit, active or implied, that may be said to induce the payment in the first instance. We conclude, therefore, that a mistake as to law, with knowledge of all the facts, there being no fraud or deceit or undue importunity, will not excuse; but, where there is an error of fact, *bona fide*—as where some fact exists that is unknown, or is supposed to exist when in reality it does not, not arising from the intentional neglect of the party to inquire as to the real condition, even if accompanied with a mistake or ignorance of the law—a recovery may be had. There is no rational distinction, in legal effect, between a mistake of law and ignorance of the law, and one will not excuse more than the other. We are impressed that the rule is stated too broadly in *Clarke v. Dutcher*, 9 Cow. 674, that, "where money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back," etc., in that the latter condition will not prevail unless the facts are such as to estop plaintiff to allege that he was without knowledge. The doctrine is better stated in *Mowatt v. Wright*, 1 Wend. 355 (19 Am. Dec. 508), and *Hurd v. Hall*, 12 Wis. 125.

2. In view of these considerations, we are clear that the conclusions of law found by the trial court do not follow from the findings of fact, and that the latter do not support the judgment rendered. The second finding is,

simply, that plaintiffs paid the money to defendant under the belief that she was entitled to it as a child of Hosea Stephens under the provisions of the codicil, which means nothing more than that plaintiffs believed that defendant was entitled to the money as heir to Hosea, being his child, and inheriting from him, he being legatee under the codicil, and, so believing, paid the money over to her. Otherwise rendered, it would be in direct antagonism to one theory of the complaint, which is that plaintiffs were informed and believed that Hosea was a legatee under the codicil, that he was alive when it took effect, and that defendant was entitled to recover the money as his daughter and heir. The information and belief that Hosea was a legatee follow from the information and belief that he was alive when the codicil took effect, so that the former is a conclusion of law in the premises; but it excludes the idea that they believed that Eva took as a legatee, nor is it alleged anywhere in the complaint that she took as a legatee under the codicil or the will.

3. The sixth finding is that it does not appear from the evidence that plaintiffs had any belief or knowledge as to whether Hosea was living at the time of the execution of the codicil, or that the plaintiffs believed that he was alive at the time of the death of the testator. The complaint to have been drawn upon two theories, or, are so incorporated. The first is as we have stated. If such theory be true in fact, plaintiffs are entitled to recover, because there would have been no mistake or error as to the fact of Hosea being alive at the time, when in matter of fact he was dead. But the facts as here alleged, the court says in its finding, do not appear by the evidence, so that plaintiffs have failed to make a case upon that theory. A second idea is that plaintiffs did not know that they paid the money that Hosea was not living

at the time the codicil became effective, and did not ascertain the fact that he was not named or referred to in the codicil as one of the legatees, and that he was not entitled to receive the legacy mentioned, and that defendant was not entitled to receive the same, until after the money was paid. If these allegations were true, and plaintiffs were not intentionally neglectful in ascertaining the real facts in relation thereto, and if they paid the money assuming *bona fide* that Hosea was alive at the time when the codicil took effect, when in truth he was not, and hence that he was a legatee, then there was also an error of fact, for which they should be excused and ought to recover. But there is absolutely no finding as to these allegations, and the findings of fact in the other alternative, as we have seen, do not support the judgment.

4. The appellant, after the findings of fact and conclusions of law had been rendered and filed, and before judgment, moved the court to make other findings of fact in the place and stead of the second and sixth findings, and to make two other additional findings, in substance, that at the time the several payments were made the defendant and her guardian claimed and believed that defendant was entitled to receive the money as legatee under the will of the testator, and that the money was paid to her as such legatee by plaintiffs, with full knowledge on their part of all the facts of her relationship to the testator on which defendant's claim was based, and error is assigned by reason of the court's refusing them. These requested findings go to the very gist of the action. But it is not in the province of this court to make findings of fact in a law action, nor can we substitute one finding in the stead of another, unless it might be in a case where no other reasonable inference could be drawn from the evidence, which is not apparent here. These are matters exclusively for the trial court.

5. Another motion was interposed for judgment dismissing the action, based upon the pleadings, evidence, and stipulations of facts. But this involves findings of facts from the evidence also, and error is not assignable.

For the reason, however, that the judgment is not supported by the findings of fact, it will be reversed, and the cause remanded for a new trial. **REVERSED.**

Decided 15 May, 1905.

ON MOTION FOR REHEARING.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

6. The appellant's counsel, by an able and cogent petition for rehearing, insist that the court has fallen into an error in its construction of the complaint, through a confusion of "error of fact" with "ignorance of fact," but upon a careful reëxamination of the matter we have arrived at the same result. "An error of fact takes place either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist": *Mowatt v. Wright*, 1 Wend. 355, 360 (19 Am. Dec. 508). This is, in substance, the definition given by Mr. Chief Justice DIXON in *Hurd v. Hall*, 12 Wis. 125, 138, which he denominates "*ignorantia facti*," thus indicating that in practical effect, at least, they are substantially one and the same thing. Ignorance is the "lack of knowledge," and ignorance of fact is the "want of knowledge of the fact in question": Bouv. Dic. "A mistake of fact consists in an unconsciousness, ignorance, or forgetfulness of a fact, past or present, material to the transaction, or in the belief of the present existence of a thing material to the transaction which does not exist, or in the past existence of a thing which has not existed": 20 Am. & Eng. Enc. Law (2 ed.), 807. Technically, a mistake of fact has the

broader significance, "and extends to and includes the case of a party who, through mere ignorance of the existence or nonexistence of a material fact, is induced to do an act * * injurious to himself, where, if he had been informed of the existence or nonexistence of such fact, he would not have performed such act": *Hurd v. Hall*, 12 Wis. 125. Then following this observation is the statement that "ignorance of the existence or nonexistence of a material fact precludes the idea that the party at the time of the transaction should have been influenced by it, for it is impossible that the mind should be moved by that of which it knows nothing." This latter observation simply means that a person could not be influenced by a fact of which he knew nothing or was not conscious of, but it does not follow that he might not be influenced by a supposed fact, or one about which he was mistaken, and thought existed or had come to pass, when in reality it had not. In such a case the real fact would not influence the mind or act, but the supposed fact would. Hence the mistake or error of fact, supposing it to be one thing instead of another, and acting accordingly. But he might act without reference to the fact, knowing nothing whatever of it, whereas, if he had been apprised of it, his course would have been different, or he would have been held to a different legal responsibility. This, we suggest, would be a technical *ignorantia facti*; but withal there is yet seeming confusion, for in practice the terms are frequently used as of interchangeable significance. "Considered as a motive of actions," says Bouvier, "ignorance differs but little from error. They are generally found together, and what is said of one is said of both."

But the distinction sought to be maintained cannot help the defendant, because the complaint, as we formerly analyzed it, which we still think to be correct, comprises both ideas of a mistake of fact and ignorance of fact. It

alleges a mistake of fact by setting forth that plaintiffs were informed and believed that Hosea Stephens was one of the legatees and alive at the time, when he was not, and ignorance of fact when they say that they did not know that Hosea was not living at the time of the death of the testator. So that, if either of these allegations were true, and plaintiffs paid the money when demanded, assuming *bona fide* the fact to be that Hosea was alive when the testator died, when in truth he was not, they would be entitled to recover. "This ignorance of fact," says Mr. Chief Justice DIXON in *Hurd v. Hall*, 12 Wis. 125, "must be excusable, that is, it must not arise from the intentional neglect of the party to investigate them." A clear, *bona fide* mistake, ignorance, or forgetfulness of facts will entitle the plaintiffs, acting in pursuance thereof in the payment of money, to a recovery. Lord ABINGER, C. B., says: "I think the knowledge of facts which disentitles the party from recovering must mean a knowledge existing in the mind at the time of payment:" *Kelly v. Solari*, 9 M. & W. 54. The principle was directly approved and adopted in the later case of *Bell v. Gardiner*, 43 Eng. C. L. Rep. 16, so that our interpretation of the complaint is within the rule of the adjudicated cases, and to this we adhere.

7. As to the second contention, it need only be said that the facts have not been determined. This was the trial court's function, and we have seen that its findings of fact do not support the judgment, nor will they support a judgment in favor of the defendant, so that we may render judgment thereon accordingly.

8. As to the evidence, there is scope for the drawing of different inferences, and not possessing the authority to try and determine a question of fact in a law action, we cannot make the findings which it is sought to have us render. "On setting aside a judgment in an action at law, the appellate court will not undertake to render or

order final judgment where the facts in issue are controverted or not definitely settled, but will order a new trial": 3 Cyc. 456. The finding that the money was "paid by plaintiff to the defendant as legatee," etc., was a conclusion of law, and so treated by the court, and it is not within our province to treat it as a finding of fact.

The rehearing will be denied.

REVERSED: REHEARING DENIED.

Argued 19 October, decided 28 November, 1904.

MACBETH v. BANFIELD.

[78 Pac. 698.]

LIABILITY OF SUBSCRIBERS FOR UNPAID STOCK SUBSCRIPTIONS.

1. Under Const. Or. Art. XI, § 8, making stockholders liable for the debts of a corporation to the amount of their stock subscribed and unpaid, and B. & C. Comp. § 5065, providing that all sales of stock shall subject the purchaser to the payment of any balance due on the stock, a stockholder in an insolvent corporation is liable for the debts of the corporation to the extent of the unpaid part of his subscription, his liability being an asset of the corporation which may be reached by a suit in equity.

RIGHT TO PAY STOCK SUBSCRIPTION WITH PROPERTY.

2. In the absence of a constitutional or statutory inhibition, the directors of a corporation may receive property in payment for stock in any case in which they are authorized under the articles of the corporation to purchase for the benefit of the corporation; but where they do so the property received must be equal in worth to the par value of the stock thus paid for.

DOCTRINE OF TRUST FUND AS TO UNPAID STOCK SUBSCRIPTIONS.

3. While it is a going concern a corporation may dispose of its assets, including the sums received on stock subscriptions, the corporate charter permitting, and no trust arises with reference thereto; but when insolvency occurs all assets, including unpaid subscriptions, become trust funds for the benefit of creditors.

CORPORATIONS—FRAUD IN PAYING STOCK SUBSCRIPTIONS WITH OVERVALUED PROPERTY—SUIT BY CREDITORS.

4. A payment of stock subscriptions with property may be attacked by creditors for either actual or legal fraud—the result is the same in both cases, the manner of proof, only, being different.

ELEMENTS IN DETERMINING GOOD FAITH OF DIRECTORS WHO ACCEPT PROPERTY IN PAYMENT FOR STOCK SUBSCRIPTIONS

5. In determining whether the directors of a corporation were guilty of fraud in taking property in exchange for stock, it is competent to consider the nature of the property, the purposes for which it was accepted, and all the circumstances attending the transaction; and, if it appears that they have acted in good faith, and that an overvaluation may have been due to an honest error of judgment, their acts are conclusive.

LIABILITY OF STOCKHOLDERS FOR DIFFERENCE BETWEEN SUBSCRIPTION AND AMOUNT PAID BY OVERVALUED PROPERTY.

6. Where stock is issued by directors for property taken at an overvaluation, it is competent, at the instance of creditors, to compel the stockholders to respond with money for the difference between the actual value of such property and the par value of the stock.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Statement by MR. JUSTICE WOLVERTON.

This is a suit by William Macbeth, trustee of the Kaupisch Creamery Company, a corporation, bankrupt, against M. C. Banfield and others. Prior to January 27, 1899, Julius C. Kaupisch and H. W. Kaupisch were engaged in the creamery business under the firm name of the Kaupisch Creamery. On that date they transferred and set over to M. C. Banfield and Thomas Rand an undivided one half interest in the business, for the stipulated consideration of \$5,000. One thousand dollars of this amount was at once applied on invoices for butter previously shipped to the firm from the East. On the following day a corporation was organized as the Kaupisch Creamery Company, with a capital stock of \$30,000, divided into 1,200 shares, at \$25 each, to which corporation the Kaupisch Creamery, the partnership concern, transferred by bill of sale all of its plant, stock, machinery, good will, etc., for the designated sum of \$16,000,

NOTE.—See extensive note in 63 L. R. A. 673-706, Equitable Remedy to Subject Choses in Action to Judgment After Return of no Property Found, and note in 8 Am. St. Rep. 810-814, Equitable Jurisdiction to Compel Payment of Unpaid Subscriptions.

See 42 L. R. A. 593-635, for a collection of English and American authorities under the heading, How Far the Payment for Stock in a Corporation by a Transfer of Property Will Protect the Shareholder Against Creditors of the Company. Read also note in 64 Am. St. Rep. 34, on Exchanging Property for Stock in Corporations.

In 8 Am. St. Rep. 817-821, is a note on How Payments for Shares May be Made.

Also read Powers of Assignees for Benefit of Creditors, of Assignees in Bankruptcy, and of Receivers, With Respect to Unpaid Subscriptions, 8 Am. St. Rep. 833.

Further, see Nature of Statutory Liability of Stockholders for Corporate Debts, 8 Am. St. Rep. 846-851.

And, see note, How Statutory Liability of Stockholders for Corporate Debts is Enforced, 8 Am. St. Rep. 854-857.

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and also paid into its treasury \$4,000 in cash, all in consideration that the board of directors of the Kaupisch Creamery Company should issue 800 shares of its capital stock, fully paid up, as follows: To Julius C. Kaupisch, 4 shares; H. W. Kaupisch, 196 shares; H. M. Kaupisch, 4 shares; M. M. Kaupisch, 196 shares; M. C. Banfield, 200 shares; and Thomas Rand, 200 shares—who were subscribers therefor. This was agreed to by unanimous vote of the board, and the stock was subsequently issued accordingly, and accepted by the parties named, thus closing the transaction. But two additional shares were subscribed for, which were fully paid up. The corporation, after engaging in business for six months or thereabouts, became insolvent; and the plaintiff was appointed trustee in bankruptcy, and now brings this suit for the benefit of the creditors, to require the above stockholders to respond for any balance of their stock that might be deemed unpaid, to the amount of the unpaid indebtedness of the concern. The plaintiff prevailed in the trial court, and this appeal is by Banfield alone.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. William Torbert Muir*, to this effect.

I. The Constitution of Oregon creates no right. The liability is under the stock subscription and is for the indebtedness, not to the creditor: *Brundage v. Monumental Min. Co.* 12 Or. 322, 324, 325 (7 Pac. 314); *Patterson v. Lynde*, 106 U. S. 519–521 (1 Sup. Ct. 432).

II. The rule governing the liability of stockholders under stock subscriptions claimed to have been paid in property is based on fraud and not the trust fund theory: *Hospes v. Northwestern Car Co.* 48 Minn. 174 (15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117–1119); *Graham v. Railway Co.* 102 U. S. 148; *Fogg v. Blair*, 133 U. S. 534–541 (10 Sup. Ct. 338); *Clark, Corp.* 539, 540–542.

III. Subscribers to the capital stock of a corporation who pay their subscription in property are not liable to the corporation in a creditors' suit as upon an unpaid stock subscription, unless the transaction by which the property is conveyed is tainted with fraud. Fraud must be alleged and proved: *Schenk v. Andrews*, 57 N. Y. 133; *Boynnton v. Andrews*, 63 N. Y. 93; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *Gamble v. Queens County Water Co.* 123 N. Y. 191 (9 L. R. A. 527, 25 N. E. 201); *Hospes v. Northwestern Car Co.* 48 Minn. 174 (31 Am. St. Rep. 637, 15 L. R. A. 470, 50 N. W. 117); *Brant v. Ehlen*, 59 Md. 1, 29; *DuPont v. Tilden*, 42 Fed. 87; *Phelan v. Hazard*, 3 Dill. 45 (Fed. Cas. 11068); *Steacy v. Little, etc. Co.* 5 Dill. 348; *Northwestern M. Ins. Co. v. Cotton Exch. Co.* 70 Fed. 155; *Young v. Erie Iron Co.* 65 Mich. 111, 121 (31 N. W. 814); *Coit v. North Carolina G. Amalg. Co.* 119 U. S. 343-345 (7 Sup. Ct. 231); *Bank of Fort Madison v. Alden*, 129 U. S. 372 (9 Sup. Ct. 332); *Fogg v. Blair*, 139 U. S. 118 (11 Sup. Ct. 476); *Peck v. Campbell*, 11 Ill. App. 88; *Streator v. Rankin*, 45 Ill. App. 226; *Coffin v. Ramsdell*, 110 Ind. 417 (11 N. E. 20); *Bruner v. Brown*, 139 Ind. 600, 605 (38 N. E. 318); *New Haven H. Nail Co. v. Linden Springs Co.* 142 Mass. 349, 355 (7 N. E. 773); *Turner v. Bailey*, 12 Wash. 634 (42 Pac. 115); *Kroenert v. Johnston*, 19 Wash. 96 (52 Pac. 605); *Savage v. Ball*, 17 N. J. Eq. 142; *Bickley v. Schlag*, 46 N. J. Eq. 533 (20 Atl. 250); *Carr v. LeFevre*, 27 Pa. St. 413; *American Tube Co. v. Hayes*, 165 Pa. St. 489 (30 Atl. 936); *Woolfolk v. January*, 131 Mo. 620-630 (33 S. W. 432); *Kelly v. Fletcher*, 94 Tenn. 1 (28 S. W. 1099); *Jones v. Whitworth*, 94 Tenn. 602 (30 S. W. 736); *National Bank v. Illinois & W. Lum. Co.* 101 Wis. 247, 254 (77 N. W. 185); *Whitehill v. Jacobs*, 75 Wis. 474, 481 (44 N. W. 630); *Elyton Land Co. v. Birmingham W. & E. Co.* 92 Ala. 407 (12 L. R. A. 307, 25 Am. St. Rep. 65, 9 South. 129); *Walburn v. Chenault*, 43 Kan. 352 (23 Pac. 657); *Troup v. Horbach*, 53 Neb. 795 (74 N. W. 326).

IV. A gross and obvious overvaluation would be strong evidence of fraud. In such cases good faith may be shown. It is a question of fact: *Boynton v. Hatch*, 63 N. Y. 93; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87.

V. Where the charter authorizes capital stock to be paid in property and the shareholders honestly and in good faith pay their subscriptions in property instead of money, third persons have no ground for complaint: *Coit v. North Carolina G. Amalg. Co.* 119 U. S. 343 (7 Sup. Ct. 231); *Bickley v. Schlag*, 46 N. J. Eq. 533 (20 Atl. 250).

VI. Property is not to be considered overvalued merely because it subsequently turns out to be so. Subsequent depreciation does not render stockholders liable: *Young v. Erie Iron Co.* 65 Mich. 111 (31 N. W. 814); *Turner v. Bailey*, 12 Wash. 634 (42 Pac. 115); *Carr v. LeFevre*, 27 Pa. St. 413; *American Tube Co. v. Hayes*, 165 Pa. St. 489 (30 Atl. 936); *Coit v. North Carolina G. Amalg. Co.* 14 Fed. 12, 18; *Bank of Fort Madison v. Alden*, 129 U. S. 372; 1 Cook, Stockholders (3 ed.), par. 35; 1 Cook, Corp. (4 ed.) par. 35, 36.

VII. There is no legal objection to the method of transfer adopted in this case: *Whitehill v. Jacobs*, 75 Wis. 474 (44 N. W. 630); *Anderson's Case*, L. R. 7 Ch. D. 75, 94.

For respondent there was a brief and an oral argument by *Mr. George William Pyle Joseph*, to this effect.

1. The trustee can maintain this suit, although the stock books show that full payment of the subscriptions has been made: *Burke v. Smith*, 83 U. S. (16 Wall.) 390; *Sawyer v. Hoag*, 84 U. S. (17 Wall.) 610, 617; *Scovell v. Thayer*, 105 U. S. 154.

2. Subscriptions for stock must be paid in money or money's worth: *Coyote G. & S. Min. Co. v. Ruble*, 8 Or. 296; *Brundage v. Monumental Min. Co.* 12 Or. 222 (7 Pac. 314); *Lee v. Imbrie*, 13 Or. 510 (11 Pac. 270); *Balfour v. Baker*

City Gas Co. 27 Or. 300 (41 Pac. 164); *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614 (48 Pac. 415); *Kroenert v. Johnston*, 19 Wash. 96 (52 Pac. 608); *Manhattan Trust Co. v. Seattle I. & Coal Co.* 19 Wash. 493 (53 Pac. 927); *Van Cleve v. Berkey*, 143 Mo. 109 (42 L. R. A. 593, 44 S. W. 743); *Preston v. Cincinnati Ry. Co.* 36 Fed. 54; *Northwestern Mut. Life Ins. v. Cotton Exch. Co.* 46 Fed. 22; *Patterson v. Lynde*, 106 U. S. 250 (1 Sup. Ct. 432); *Coit v. North Carolina G. Amalg. Co.* 119 U. S. 343 (7 Sup. Ct. 231); *Lloyd v. Preston*, 146 U. S. 630 (13 Sup. Ct. 131); *Sprague v. National Bank of Amer.* 172 Ill. 149 (42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. W. 19); *Douglas v. Ireland*, 73 N. Y. 100; *Gamble v. Queens County Water Co.* 123 N. Y. 191 (9 L. R. A. 527, 25 N. E. 201); *Howe v. Illinois Agri. Wks.* 46 Ill. App. 85; *Pickering v. Townsend*, 118 Ala. 351 (23 South. 703).

3. It is not necessary for the trustee, plaintiff herein, to prove an actual fraudulent intent, in order to invalidate the transaction alleged in the complaint, inasmuch as a gross overvaluation of the property received for stock is a fraud in law, and from the facts alleged and proven a gross overvaluation of the property transferred to the corporation appears: *Clark, Corp.* pp. 379, 380, 381.

MR. JUSTICE WOLVERTON delivered the opinion.

The gist of the controversy is that as to the creditors the stock was fraudulently issued as fully paid up, when in reality less than half of its par value has been so paid.

The conclusions of fact are not difficult of ascertainment. The Kaupisch Creamery owned certain property and merchandise which it had acquired in the course of five month's engagement in the creamery business; and, it being desirous of enlarging its business and placing its management in the hands of a corporation, Banfield and Rand purchased a half interest therein, so that nominally, and for the time being, they became partners with

the Kaupisches. For the purpose of ascertaining the value of the property of the partnership, an inventory was taken, which showed a valuation of \$4,700. It was then agreed between all the parties concerned, with the view of making Banfield and Rand equal in the investment with the Kaupisches, that they should contribute or pay into the concern the sum of \$5,000, which they did. That \$1,000 was used by the Kaupisches to pay certain indebtedness of the company for butter consignments from the East, can have no special bearing in the case. It does not lessen the amount of Banfield and Rand's contribution to the business, which was designed to make them equal with the Kaupisches; the contribution of the Kaupisches being the property formerly belonging to the Kaupisch Creamery, under which name they were engaged as partners. A bill of sale was given at the time by the Kaupisch Creamery and the Kaupisches to Banfield and Rand, describing the property set over as "an undivided one half interest in and to all of the plant, stock, book accounts, and good will of said business." There appears to have been no stipulation that it should be free from incumbrance, or that the concern was free from debt, but only that it was agreed that the Kaupisches, as partners, should, for the consideration of \$5,000 to be paid into the concern, sell and transfer to Banfield and Rand an undivided half interest in the business; the effect being that Banfield and Rand were taken into the company as equal partners with the Kaupisches, the company still being obligated to pay the indebtedness of the concern. This seems to us to have been the exact status of the parties after the sale of the one half interest in the business of the Kaupisch Creamery to Banfield and Rand, and prior to the completion of the organization of the Kaupisch Creamery Company, and the transfer to it of the property of the Kaupisch Creamery. On the completion of the organi-

zation, all of the property described as "all of the plant, stock, machinery, and good will of the said business," was transferred to the corporation by bill of sale regularly executed by the Kaupisch Creamery, the Kaupisches, and Banfield and Rand. The consideration named as the inducement for this transfer is \$16,000, besides which the Kaupisch Creamery paid over and turned into the treasury of the Kaupisch Creamery Company the sum of \$4,000. These sums, aggregating \$20,000, constituted the consideration for the issuance of 800 paid-up shares of the capital stock of the corporation to the several parties named in the statement above; they having formerly subscribed for the same. Thus the corporation became invested with the property of the Kaupisch Creamery, and thus it is that the stockholders named acquired their stock, so that the transactions clearly indicate what the exact consideration was which the subscribers paid for their stock.

It will be noted that the bill of sale by the Kaupisch Creamery to Banfield and Rand describes the property designated for transfer in precisely the same language as the bill of sale to the corporation, with the exception that the words "book accounts" are included in the former; both containing the words "good will of said business." Evidently, therefore, that particular species of property was in the minds of the parties while agreeing upon and consummating both transactions, and was especially made the subject of transfer in each case. In the former, the good will, together with the other property of the Kaupisch Creamery, was considered the equivalent of \$5,000 in value, and nothing more, for that sum is what Banfield and Rand paid into the concern in order that they might become one half owners in the whole. There was some indebtedness of the concern, but this, from the result of the transaction, was to be shared by all the parties, and was in fact paid out of the business, so that here we have

the estimate of the parties concerned as to the value of the good will. When, however, these parties transferred the identical property to the corporation, which was practically organized by themselves, they fixed a valuation of \$16,000 as its worth to the company; exceeding by more than three times the value placed upon it in the first transfer, although the two transfers were made in point of time with but a single day intervening. Further than this, the Kaupisch subscribers to the capital stock and Banfield and Rand on January 27th, the day of the transfer of one half interest in the property of the Kaupisch Creamery to Banfield and Rand, entered into a written agreement whereby the Kaupisches, on the one part, agreed to take 400 shares of the capital stock of the Kaupisch Creamery Company, and to pay therefor \$2,000 in cash, and the remainder, or \$8,000, in the plant, stock, and good will of the creamery business, and Banfield and Rand, on the other part, agreed to take a like number of shares, and to pay therefor in like manner as the Kaupisches were to pay for their stock; and it was further agreed between the parties so designated and subscribing that they should not sell to any outside party, and that, in case either of them desired to sell, the other should have the option to purchase, at \$12.50 per share; stipulating as liquidated damages in case of a breach of the condition the rate of \$12.50 per share for each and every share so otherwise sold. Banfield and J. C. Kaupisch, testifying in the case, however, gave it as their honest conviction that the plant, stock, and good will of the partnership were fully worth the valuation placed upon them by this agreement, namely, \$16,000, and that the board of directors received them, together with the \$4,000 cash, in entire good faith, in payment for said stock. But speaking further of this last-mentioned agreement, and in explana-

tion of its purpose, Kaupisch says: "Well, if one wanted to drop out, we only paid \$5,000. That was just among ourselves. If he had \$10,000 worth of stock, and only paid \$5,000 for it, then may be he could force the other to ask \$10,000 for it." Further on the following inquiries were made, and answers elicited:

"Q. You paid in \$4,000 into the corporation?

A. \$5,000. I believe the books show the corporation got the benefit of \$4,000 in cash. * *

Q. You were paying for \$10,000 worth of stock with \$5,000?

A. That was the proposition.

Q. You paid \$12.50 a share for your stock, was it not? You paid just half?

A. Yes, sir; that would be \$12.50.

Q. But if anybody else came in afterwards and subscribed for stock, you were going to charge them \$25 a share?

A. That was the idea."

This theory of the transaction is borne out by Dey, who was desirous at one time of procuring some of the stock, but refused to purchase because he could not obtain it on the same basis at which the parties had procured theirs, namely, at the rate of fifty per cent of the par value. There is scarcely a doubt, therefore, that these parties procured their stock at not to exceed fifty per cent valuation, and that they so understood it, although they speak in the record to the contrary, by giving it as their opinion that the property and good will of the partnership were of the actual value they placed thereon in making the transfer to the Kaupisch Creamery Company. To conform to their estimate, the good will of the concern must have been of enormous value, namely, the difference, at least, between the sum of \$4,700 and \$16,000, or \$11,300. The Kaupisch Creamery had been running but five months, starting with an investment of \$2,000. True, the profits

during that time were estimated at \$2,300; and the business was extensive ; but, with all this, it is impossible that the good will should be worth several times the capital invested. It is argued that the inventory was made on the basis of the cost price, and it is pointed out that one machine was valued at \$150, its cost price, whereas its real value was \$2,000. This is the only article specifically mentioned upon which stress is laid, but the claim for it is seriously controverted by the evidence, and, upon the whole, it is manifest that the contention lacks support. The inventory was probably made as other inventories usually are where there is to be a sale or transfer of the property involved for the purpose of arriving at substantial values, so that a basis may be had for intelligent dealing with reference to it. It is plain, therefore, that either by design or through bad judgment there was the grossest kind of overvaluation of this property to be taken in payment for the stock to be issued by the corporation to these subscribers, and that they did not really pay to exceed fifty per cent of the par value therefor. Such being the conclusion as to the fact, we are now to inquire as to the law applicable in the premises.

1. The appellant's contention is that the corporation, through its board of directors, exercised its best judgment as to values, and acted in entire good faith in accepting the property, including the good will of the partnership concern, in full payment of the capital stock issued, and therefore the transaction is unimpeachable at the suit of creditors ; in other words, the stockholders must be held to be exonerated from all liability to the corporation for the benefit of the creditors, except in case of actual fraud charged against the corporation and stockholders, and affirmatively proven. That a suit in equity is maintainable by a creditor, or one standing in his stead, to recover against the stockholder of an insolvent corporation an

unpaid balance of his stock subscription, must be deemed to be settled law in this State ; the liability being not to the creditor, but for the indebtedness to the corporation, which is treated as an asset, and to which the creditor is entitled in the adjustment of legal demands against the corporation : *Ladd v. Cartwright*, 7 Or. 329 ; *Falco v. Kaupisch Creamery Co.* 42 Or. 422 (70 Pac. 286) ; *Patterson v. Lynde*, 106 U. S. 519 (1 Sup. Ct. 432). By the mandate of our constitution, stockholders are made liable for the indebtedness of the corporation to the amount of their stock subscribed and unpaid : Const. Or. Art. XI, § 3. In pursuance of this clause, it was early enacted that "all sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person for whom the same is purchased, and subject such purchaser to the payment of any unpaid balance due, or to become due, on such stock ; but, if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser" : B. & C. Comp. § 5065. There is an amendment to this statute, but it came at a time subsequent to the transactions upon which the present suit is founded : Laws 1903, p. 212.

2. These enactments, both fundamental and legislative, indicate quite clearly the policy of the lawgiver touching the payment of stock by a subscriber. His liability is to the full amount of the capital stock subscribed. The directors of a corporation, in the absence of a constitutional or statutory inhibition to the contrary, may receive property in payment for stock in any case in which they are authorized under the charter or articles of incorporation to purchase for the benefit of the corporation, and to subserve the purposes for which it is organized : *Clark, Corp.* 379. Of course, ordinarily, where there has been no agreement with the directors that the subscriber for

stock might pay for it in property, the obligation is to pay in money, and when so payable there can be no possible cavil as to the amount that would be required to meet his liability. It must be the equivalent of the par value of his stock. Money is admittedly the standard of all values, and it is a natural sequence that, if stock liability is to be discharged in property, the property should measure up to a money value. Such is, no doubt, the plain intentment of the law; otherwise it might easily be so managed that stock subscribers would be virtually exonerated from their statutory liability by pretended and simulated agreements with the directors, and the corporation left without assets of material moment from the beginning, which would atrociously belie the representations made by the articles of incorporation touching the capital stock. Such is not the spirit of the law, nor has it been so where there were no statutory regulations upon the subject; the common declaration being that the stock must be paid in money or money's worth—that is, what may fairly and justly be considered as money's worth: *Wetherbee v. Baker*, 35 N. J. Eq. 501, 513; *Van Cleve v. Berkey*, 143 Mo. 109 (44 S. W. 743, 42 L. R. A. 593, 598); *Fogg v. Blair*, 139 U. S. 118 (11 Sup. Ct. 476); *Camden v. Stuart*, 144 U. S. 104 (12 Sup. Ct. 585); *Elyton Land Co. v. Birmingham W. & E. Co.* 92 Ala. 407, 423 (9 South. 129, 12 L. R. A. 307, 25 Am. St. Rep. 65).

3. We deem it important in this connection to state the basis of the stockholders' liabilities for the benefit of the creditors of the corporation, in view of the theory advanced that a subscription to the capital stock of the corporation is a mere contract of purchase, in which there is no element of trust; that the corporation, on the one hand, and the subscriber, on the other, are the parties to the contract—one to deliver stock, and the other to pay therefor; that the board of directors may determine how and in what

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the manner stock payments may be made; and that if the parties concerned, acting bona fide, mutually agree upon the terms of the contract, including the manner in which stock obligations shall be discharged, the transaction should be held valid, except for fraud, or a course of dealing tantamount thereto, the same as if the contract were made between parties sui juris. There is a familiar doctrine, commonly called the "American doctrine," that the capital of the corporation constitutes a trust fund for the benefit of the creditors, which is said to rest upon the equitable consideration that the distribution of the capital stock among stockholders without making adequate provision for the payment of debts, or the issuance of fictitious paid-up stock, is a fraud upon creditors contracting with the corporation in reliance upon its capital remaining intact, or in reliance upon the professed capital having been in fact paid up in full: *First Nat. Bank v. Gustin Min. Co.* 42 Minn. 327, 332 (44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510). The doctrine, taken in its fullest signification, is severely criticised as in itself inadequate, and as affording an erroneous basis upon which to found the creditor's remedy. His right of recourse to obligations for unpaid stock is no more sacred or operative than his right to any other asset of an insolvent corporation. The corporation may undoubtedly dispose of its assets as it may see fit while a going concern, its charter permitting; and, if in the mean time it has fairly disposed of stock subscriptions (that is to say, collected the just demands arising therefrom, and in good faith disposed of the proceeds), there can arise no trust with reference to it, any more than there could for any other asset that has passed through and out of its hands. It is only when the unpaid capital becomes an asset of an insolvent concern that it is impressed with a trust in favor of creditors. And so it is with an individual or any ordinary partnership. All assets

in their insolvency become trust funds for the benefit of creditors.

Perhaps a more reasonable and substantial ground for the liability is that promulgated by Mr. Justice MITCHELL in *Hospes v. Northwestern M. & C. Co.* 48 Minn. 174, 197 (50 N. W. 1117, 1121, 15 L. R. A. 470, 31 Am. St. Rep. 637). He says: "By putting it [the liability] upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation, and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid-in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and, in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, 'Make that representation good by paying for your stock.' It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases; and it follows that it is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of 'bonus' stock"—or, we may add here, stock the payment of which, either in full or in part, has been merely simulated, and not in reality made as contemplated by the relationship under the law.

4. Now, to recur to the initial contention : It is, no doubt, the doctrine of some of the cases that, where the directors have acted in good faith and according to their best judgment in fixing and agreeing with the shareholders as to the value of the property to be taken and accepted in payment of stock subscriptions, their acts in the premises are unimpeachable, and can only be annulled or set aside for actual — that is to say, intentional or active — fraud, which must be affirmatively shown. But there are other cases holding to what we deem to be the sounder view, being the better calculated to inculcate fair dealing and meet the ends of right and justice. We quote from *Coleman v. Howe*, 154 Ill. 458, 469 (39 N. E. 725, 727, 45 Am. St. Rep. 133), in exemplification : “ Where property whose value is well known or can be easily learned is taken at an exaggerated estimate, a strong presumption is raised that the valuation is not in good faith, and is made for a fraudulent purpose. This presumption will be conclusive, unless rebutted by satisfactory evidence explanatory of the apparent fraud. Where the overvaluation is so great that the fraudulent intent appears on its face, and is not explained, the court will hold it to be fraudulent as matter of law.” So, in *National Tube Works Co. v. Gilfillan*, 124 N. Y. 302, 307 (26 N. E. 538, 539), the court, speaking through Mr. Justice VANN, say : “ The fraud is consummated by the issue of stock as full-paid stock * * which has not been fully paid, * * and it does not depend upon any fraudulent intent, other than that which is evidenced by the act of knowingly issuing stock for property to an amount in excess of its value.” The language of Mr. Justice FIELD is : “ But where full-paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud”: *Coit*

v. *N. Car. G. Amalg. Co.* 119 U. S. 343, 345 (7 Sup. Ct. 231, 233). To a like purpose is *Whitehill v. Jacobs*, 75 Wis. 474 (44 N. W. 630), although the syllabus would seem to limit the rule. See, also, *Young v. Erie Iron Co.* 65 Mich. 111, 123 (31 N. W. 814). Fraud in law is therefore as effective to impeach the transaction in favor of creditors as fraud in fact; the difference being that in the one case the law raises the intent from the nature of the transactions, while in the other it must appear by affirmative proof, and, the intent being presumed, it must be rebutted, or the law will declare the act fraudulent. One is as vicious in circumventing right and justice as the other.

5. If, however, the nature of the property and the extent of the overvaluation are such that the excess valuation may have possibly been due to error in honest conviction or judgment, then, to render the transaction invalid, actual fraud must be shown, and it is one of fact, the real question in cases of this character being whether the property was placed and taken at a high valuation with a fraudulent intent of evading the plain mandate of the law. It is competent for the determination of the question to take into consideration the nature of the property, the purposes for which it is accepted, and all the conditions and circumstances attending and surrounding the transaction; and if, from the whole, it appears that the board has acted in good faith, in the honest exercise of its best judgment, no adverse presumption impeding, then are its acts conclusive, otherwise not: *Clark, Corp.* 380, 381; *Van Cleve v. Berkey*, 143 Mo. 109 (42 L. R. A. 593, 598, 44 S. W. 743); *Boynton v. Andrews*, 63 N. Y. 93; *Douglass v. Ireland*, 73 N. Y. 100; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *Elyton Land Co. v. Birmingham W. & E. Co.* 92 Ala. 407, 423 (25 Am. St. Rep. 65, 12 L. R. A. 307, 9 South. 129); *Osgood v. King*, 42 Iowa, 478; *Jackson v. Traer*, 64 Iowa, 469 (20 N. W. 764, 52 Am. Rep. 449).

6. When stock is issued for property taken at an overvaluation, it is competent to compel the stockholder to respond for the difference between the actual value of such property and the par value of the stock: *Coleman v. Howe*, 154 Ill. 458, 469 (45 Am. St. Rep. 133, 39 N. E. 725, 727); *Jackson v. Traer*, 64 Iowa, 469. In this view of the law, there is but one conclusion to be reached. There was an exaggerated and gross overvaluation of the property, and the presumption of bad faith thereby engendered has not been satisfactorily explained away or rebutted. But when the fact is considered in connection with all the other facts disclosed by the testimony, we are convinced that there was a scheme having in contemplation from the beginning the issuance of this stock as fully paid up, for a consideration not to exceed one half of its par value, and that actual fraud has been shown. We find, therefore, that the other half of the stock is unpaid, and in this particular alone will the findings of the trial court be modified. It does not change the result, however, and the decree of the trial court will be affirmed.

In this opinion we have considered the liability of a subscriber to the capital stock of a corporation — not one who comes by it by purchase or otherwise — to a creditor dealing with the company subsequent to the issuance of the stock without knowledge of the true basis upon which it was issued. Furthermore, we pass no opinion on the intendment of the amendment in 1903 of Section 5065, B. & C. Comp. It is not involved in this controversy, having been enacted subsequent to the time when the rights and liabilities of the parties herein became fixed.

AFFIRMED.

Decided 19 December, 1904.

STATE v. TELLER.

[78 Pac. 980.]

ELEMENTS OF LARCENY.

1. Larceny consists of taking the personal property of another, without the owner's consent, accompanied by an intent to wholly deprive the owner thereof.

INSTRUCTIONS MUST PRESENT RESPECTIVE THEORIES OF PARTIES.

2. A party who has offered evidence in support of the issues on his part is entitled to instructions that will present his theory of the case to the jury for consideration.

EVIDENCE — LARCENY — EMBEZZLEMENT.

3. The evidence here does not show any facts on which the court could properly instruct the jury as to the law where the missing property came lawfully into the hands of the defendant.

From Harney: MORTON D. CLIFFORD, Judge.

Francis M. Teller appealed from a conviction of larceny. AFFIRMED.

For appellant there was a brief over the names of *Lionel R. Webster*, *Geo. W. Hayes*, and *Hayward H. Riddell*, with an oral argument by *Mr. Webster*.

For the State there was a brief over the names of *Andrew M. Crawford*, Attorney General, and *J. W. McCulloch*, with an oral argument by *Mr. Crawford*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

The defendant, Francis M. Teller, was convicted of the crime of larceny, alleged to have been committed in Harney County May 16, 1903, by unlawfully taking, stealing, and carrying away \$145 in gold coin and \$55 in currency of the United States, the property of one Mrs. L. S. Whitmer, and from the judgment which followed he appeals.

1. An exception having been taken, it is contended by defendant's counsel that the court erred in refusing to charge the jury as they requested, to wit: "If the money alleged to have been stolen was given to Mrs. Smith and

the defendant by Mrs. Whitmer to keep for her until called for, then I instruct you to find the defendant not guilty." It is argued that testimony was introduced at the trial tending to show that the money alleged to have been stolen came lawfully into the defendant's possession, and that, if it be assumed, even, that he converted any part of it, though he might, under a proper indictment, have been found guilty of embezzlement, he could not have been convicted of larceny as charged, and hence he was entitled to have his theory of the case clearly stated to the jury. Larceny consists of an intent to trespass on the personal property of another, coupled with an intent wholly to deprive the owner thereof, and the crime is not committed unless such intents concurrently and contemporaneously exist: 1 Bishop, Crim. Law (7 ed.), §§ 207, 342; Rapalje, Larceny, § 20. In *State v. Hull*, 33 Or. 56 (54 Pac. 159, 72 Am. St. Rep. 694), Mr. Justice BEAN, in discussing this subject, says: "To constitute the crime of larceny, as charged in the indictment, there must be a trespass, that is, a taking of the property without the consent of the owner." In *State v. Meldrum*, 41 Or. 380 (70 Pac. 526), it was also said: "It is familiar law that, where property is delivered by the owner to another, and is received *bona fide* and in good faith, a subsequent wrongful conversion pending possession will not support an indictment for larceny in the original taking." In *Johnson v. People*, 113 Ill. 99, in a very learned opinion, Mr. Justice MULKEY says: "As trespass is an injury to the possession only, it logically and legally follows that no one in the lawful possession of goods can commit larceny of them, for it would be idle and absurd to talk of one committing an injury to his own possession."

2. It has repeatedly been held that, when a party to an action has given evidence tending to sustain the issues on his part, he is entitled to have the jury instructed on his

theory of the case: *Fiore v. Ladd*, 25 Or. 423 (36 Pac. 572); *Barnhart v. Ehrhart*, 33 Or. 274 (54 Pac. 195); *Farmers' Bank v. Woodell*, 38 Or. 294 (61 Pac. 837, 65 Pac. 520); *Lewis v. Craft*, 39 Or. 305 (64 Pac. 809); *Bingham v. Lipman*, 40 Or. 363 (67 Pac. 98); *State v. Smith*, 43 Or. 109 (71 Pac. 973).

3. Based on these elementary rules, it remains to be seen whether or not any testimony was given tending to show that the money alleged to have been stolen came lawfully into the defendant's possession. The transcript shows that in May, 1903, Mrs. L. S. Whitmer and her husband started from Huntington, Oregon, for California, with a team of horses and a wagon, and, having some money of her own, she wrapped it in cloth, securely sewing the edges, and placed the bundle in a box of household goods which they carried. These people quarreled on the road, in consequence of which Mrs. Whitmer concluded to leave her husband, and, after reaching Burns, Oregon, she opened the box without his knowledge, secured the package, and took it, unopened, to the Cottage Hotel, which was kept by Mrs. Smith, the defendant's mother-in-law, to whom she presented a letter of introduction, detailed the difficulty she had had with her husband, and stated that she feared he would try to get possession of the money. After consulting with the defendant, who suggested that it should be left with a merchant or at a bank, Mrs. Smith finally consented to hide it, whereupon the package and some currency that Mrs. Whitmer had upon her person were delivered to her, and, without the defendant's knowledge, she placed them in a bureau in the room of the hotel occupied by him and his wife. Whitmer discovered that the money had been taken, and went to the hotel, claiming that it belonged to him, charging his wife with the larceny thereof, and creating such a disturbance that he was ejected. After he left the hotel,

his wife drew a check on a bank in Idaho, making it payable to the defendant, who deposited it with a bank in Burns for collection, and when the money was received thereon he delivered it to her.

The defendant, as a witness in his own behalf, testified that when he received the check Mrs. Whitmer said to him: "I want you to take care of my money. I am going to have an awful time here." He further said that in the evening of the day the package was left at the hotel, he and his wife having retired for the night, his sister-in-law entered their room, saying that Mrs. Whitmer had been arrested for the larceny of the money, and that the house would be searched in trying to find it; that, having promised Mrs. Whitmer to look after her money, though he had never seen it, he learned from his wife that it was in the bureau, to which he went, securing the package, and, knowing that Whitmer could accurately describe it, he removed the cloth, and wrapped the money in a towel, hiding it in a woodshed; that immediately on returning his wife informed him there was also in the bureau \$100 in currency belonging to Mrs. Whitmer, which he had overlooked, whereupon he placed \$40 thereof in his vest pocket, his wife putting the remainder with some gold she had; and that a peace officer came to the hotel, and searched Mrs. Whitmer's trunk, but failed to find any money. This witness also said that the next morning after the arrest he went to the jail to see Mrs. Whitmer, who inquired of him, "Is everything safe?" and receiving an affirmative answer, she thanked him; that a few hours thereafter the charge preferred against her was examined by a magistrate, and she was discharged; that Whitmer being unable to pay the bills he had incurred at Burns, his wife gave him \$30 for that purpose, the witness paying her that sum from the currency which he had in his vest pocket; that Whitmer, upon receiving the money, resumed

his journey, leaving his wife at the hotel; that upon his departure the witness inquired of her, "Shall I bring your money to you, Mrs. Whitmer?" saying, "I don't want to be responsible for it," and she, in answer thereto, referring to her husband, replied, "No, wait until he is well off the field; way off." After the money had remained in the shed three days, the defendant, at Mrs. Whitmer's request, delivered it to her, wrapped in the towel, upon the receipt of which she claimed that a small sack of gold, which the package originally contained and some currency, amounting in all to \$200, had been taken.

The defendant having testified that he lived at the Cottage Hotel, his counsel, in referring thereto, inquired, "You helped conduct the institution and worked around the place?" to which he replied, "Yes, sir." Mrs. Smith, as defendant's witness, in referring to the delivery of the check to her son-in-law, and also to the request made at that time by Mrs. Whitmer to him, testified as follows: "She looked up at him, not me, and says, 'Now, you will see that my money is safe, won't you?' and he said, 'I promised to stand by you, and I will do it.'" This witness, alluding to the defendant's inquiry of Mrs. Whitmer after she was discharged from arrest, and to the latter's answer thereto, and to her reference to her husband, and to the money she desired to give him, also testified: "He says, 'Shall I get your money now?' and she says: 'No; wait until he is off the field. Wait until he gets away outside of town. Don't bring it out as long as he is here.' She says: 'I want to give him \$30 to get off. He hasn't a bit of money.'" The defendant's wife, as his witness, testified that in the afternoon of the day the package was left with her mother Mrs. Whitmer told her husband she wanted him to stay by her, and protect her money, and he promised to do so. This witness having visited Mrs. Whitmer when she was in the custody of an

officer, referring thereto, and to her husband as a physician, further testified: "The next morning I went up to Mrs. Dodson's, and as I went back I went to see her; and 'the doctor,' I says 'has kept your money for you, and put it where no one will find it'; and she says, 'I am very thankful, and I want you to thank the doctor for doing that.'"

The foregoing is the substance of the testimony applicable to the error relied upon as tending to show that the defendant was interested with Mrs. Smith in the management of the hotel, so that the giving of the money to her was, in law, a delivery thereof to him. Our statute, so far as deemed involved in the inquiry under consideration, is as follows: "If any * * agent, clerk, employé, or servant of any private person, * * shall embezzle or fraudulently convert to his own use, or shall take or secrete, with intent to embezzle or fraudulently convert to his own use, any money * * which shall have come into his possession, or be under his care, by virtue of such employment, such * * agent, clerk, employé, or servant shall be deemed guilty of larceny, and upon conviction thereof shall be punished accordingly": B. & C. Comp. § 1805. In *Snapp v. Commonwealth*, 82 Ky. 173, the plaintiff in error, who, as a chief clerk and cashier of a tax collector, had almost the entire control of the office and of the moneys received in pursuance thereof, was convicted of the larceny of public funds belonging to the City of Louisville, and, having appealed, the judgment was reversed, the court holding that whatever moneys were received by the principal or by his clerk in the discharge of their duties came lawfully into the hands of both, and, each having a right thereto, the appellant could not be convicted of the crime charged. In the case at bar, though the defendant testified that he helped conduct the hotel and worked around the place, it fails to show in what capacity he was employed, or that it

was his duty or custom ever to take charge of any of the money received from or deposited by guests. There is an entire lack of proof tending to show that he was the agent or representative of his mother-in-law in such a manner as to entitle him to the possession of the package or of the money given to her, nor does it appear that they came into his possession, or under his care, by virtue of his employment.

It is maintained that the testimony tends to show that the defendant secured possession of the money with Mrs. Whitmer's knowledge and consent. It conclusively appears, from an inspection of the transcript, that the package and currency were delivered to Mrs. Smith, and not to the defendant. He had never seen any of the money, and did not know where it was placed, until his wife informed him, when the officer came to arrest Mrs. Whitmer, whereupon he removed it from the bureau. Prior thereto the money was never in his possession. It may be inferred, however, from his wife's testimony, that Mrs. Whitmer knew he had placed the money where it could not be found, for which she was thankful; but, if it be assumed that a conversion of the money, the possession of which was secured under the circumstances detailed, constitutes embezzlement, and not larceny, so that a conviction could not be sustained under an indictment charging a commission of the latter crime, the legal principle insisted upon does not come within the instruction requested, which is based on the theory that testimony was introduced tending to show that the money was delivered to the defendant by Mrs. Whitmer.

Believing no error was committed as alleged, the judgment is affirmed.

AFFIRMED.

Decided 12 December, 1904.

BUCKMAN v. UNION RAILWAY CO.

[78 Pac. 748; — L. R. A. —.]

RES JUDICATA — EXAMPLE OF ESTOPPEL.*

1. A judgment or decree rendered upon the merits is a bar to a subsequent proceeding between the same parties upon the same claim as to every matter that was or might have been litigated therein; but where the subsequent proceeding is upon a different claim, the prior adjudication is at bar as to only the matters actually litigated.

This is an instance of estoppel as to matters that might have been determined: A street railway company commenced a suit against a bank to compel the cancellation of certain of the company's bonds held by the bank as collateral, on the ground that they were never issued for value. Issue being joined, the suit was tried on the merits and a decree rendered against the company. At the time the suit was commenced the company might have pleaded payment theretofore made and estoppel by the conduct of the bank's officers, but did not plead or present either of these causes of suit. Afterward the bonds were sold by the bank, and the purchaser sued the company to enforce payment and foreclose the lien of the mortgage securing the bonds. To this suit the company answered by pleas of former payment and of estoppel by the conduct of the former owner of the bonds. *Held*, that the prior adjudication between the bank and the company was a bar to any further claim of either payment or estoppel, as both might have been pleaded by the company in its suit for cancellation.

2. Where a street railroad brought suit against a bank to compel cancellation of certain of the street railroad bonds held by the bank as collateral, a decree in the bank's favor is no bar to a suit by a purchaser of the bonds from the bank, at a sale of the collateral, to enforce payment of the bonds, and to foreclose the mortgage given for their security.

From Union: ROBERT EAKIN, Judge.

Statement by MR. JUSTICE BEAN.

This is a suit by George W. Ruckman against the Union Railway Company and the Union Street & Suburban Railway Company. In January, 1893, the Union Railway Company issued and delivered to J. W. Shelton twenty bonds, of the par value of \$1,000 each, secured by mortgage on its property. Shelton sold four of the bonds, and they came into the hands of F. L. Richmond and W. T. Wright. Wright and Richmond borrowed \$1,500 of the First National Bank of Union on their promissory note, and deposited the four bonds as collateral security therefor,

* NOTE.— In 44 Am. St. Rep. 562, is a long note on Proof of Res Judicata, and see collection of annotated cases in 93 Am. St. Rep. 742.

under an agreement that in case the note was not paid at maturity the bank might, at its option as to time and manner, and without notice to the pledgors, sell the bonds at public or private sale to pay the amount due on the note, together with accruing interest and costs. Default was made in payment of the note, and the bank elected and undertook to foreclose its lien upon the bonds in the manner provided in the agreement, whereupon the defendant, the Union Street Railway Company, which had purchased the mortgaged property after the bonds had been transferred to the bank, brought a suit in equity to compel the bank to surrender up such bonds for cancellation, on the ground that they were issued in trust to Shelton, in order that he might negotiate them to intending purchasers for the use and benefit of the company, and had been delivered to the bank by Shelton for safe-keeping until so sold and disposed of; that no sale had been made, and therefore, in equity, they belonged to the plaintiff, as the purchaser of the property covered by the mortgage given to secure the payment thereof. Issue was joined, and the suit tried and determined on the merits, resulting in a decree in favor of the defendants: *Union St. Ry. Co. v. First Nat. Bank*, 42 Or. 606 (72 Pac. 586, 73 Pac. 341). The bank thereafter foreclosed its lien upon the bonds, and sold them to the present plaintiff, who brings this suit to enforce the mortgage given by the railway company to secure the payment thereof. For a defense to the present suit, the defendants allege, in brief, (1) that the bonds were paid in full to the bank out of the money paid by the promoters of the Union Street Railway Company for the mortgaged property; and (2) that W. T. Wright, the president of the bank, was present at and participated in the negotiations for the purchase, and knew that such promoters understood and believed at the time that such purchase would be free of all liens

and incumbrances, notwithstanding which he failed and neglected to disclose to them the lien of the bank on the four bonds in suit, but permitted them to pay over the money and take a conveyance of the property in ignorance thereof, and therefore the bank and its successor with knowledge should now be estopped from asserting that such bonds are a lien upon the property. The plaintiff pleaded the decree in the former suit as a bar, and averred that all the matters and things now alleged as a defense to the present suit were known to the defendants at the time the former suit was commenced, and should have been alleged therein as a ground of recovery. The court below held the former decree not a bar or estoppel, found the facts in favor of the defendants, and dismissed plaintiff's complaint. REVERSED.

For appellant there was a brief over the names of *C. E. Cochran* and *Crawford & Crawford*, with an oral argument by *Mr. Cochran* and *Mr. Thomas H. Crawford*.

For respondent there was a brief and an oral argument by *Mr. Leroy Lomax* and *Mr. Charles H. Finn*.

MR. JUSTICE BEAN delivered the opinion.

Upon the record, we have substantially this state of facts: A party commenced a suit against another to compel the surrendering up for cancellation of negotiable instruments on the ground that they were never issued for value. Issue was joined, the suit tried on the merits, and a decree rendered in favor of the defendant. At the time the suit was commenced, the plaintiff therein had two other grounds upon which he might have recovered, neither of which, however, he set up or alleged in the complaint. Thereafter, when the defendant in the former suit, or the party who had succeeded to his interest with knowledge, brought an action to enforce the payment of the instruments, and to foreclose the lien given as security

therefor, the defendant therein and the plaintiff in the former suit pleads as a defense the two matters which he might have relied upon for relief in his first suit. The question for decision is whether he is estopped by the former decree against him from pleading such defenses.

1. It is settled law in this State, as elsewhere, that a judgment or decree rendered upon the merits is a final and conclusive determination of the rights of the parties, and a bar to a subsequent proceeding between them upon the same claim or cause of suit, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and had decided as incident to or essentially connected therewith, either as a matter of claim or defense (*Neil v. Tolman*, 12 Or. 289, 7 Pac. 103; *Morrill v. Morrill*, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95; *Belle v. Brown*, 37 Or. 588, 61 Pac. 1024; *White v. Ladd*, 41 Or. 324, 68 Pac. 739, 93 Am. St. Rep. 732), but that when the action is upon a different claim or demand the former judgment can only operate as a bar or an estoppel as against matters actually litigated or questions directly in issue in the former action: *Barrett v. Failing*, 8 Or. 152; *Applegate v. Dowell*, 15 Or. 513 (16 Pac. 651); *La Follett v. Mitchell*, 42 Or. 465 (69 Pac. 916, 95 Am. St. Rep. 780); *Caseday v. Lindstrom*, 44 Or. 309 (75 Pac. 222); *Gentry v. Pacific Livestock Co.* 45 Or. 233 (77 Pac. 115). This distinction should always be kept in mind in considering the effect of a former judgment or decree. If the second action or defense is upon the same claim or demand, the former judgment is a bar not only as to matters actually determined, but such as could have been litigated; but, if it is upon another claim or demand, the former judgment is not a bar, except as to questions actually determined or directly in issue. This case comes within the principle first stated. It is a suit between the same parties and upon the same claim or

demand as the former suit. The claim or demand in the first suit brought by the defendant Union Street Railway against the bank was the validity of the bonds, and the right of the bank to enforce them against it. This is the same identical question presented, and the only one for adjudication, in the present suit. It was determined in the former suit, and the decree therein is a bar to further litigation thereof between the same parties, although the plaintiff therein did not allege or urge all the reasons entitling it to relief as demanded. The law requires a party to try his whole suit or action at one time, and he cannot separate his claim or divide his grounds of recovery or defense.

The application of this principle is illustrated by two federal cases. In *Patterson v. Wold* (C. C.), 33 Fed. 791, the plaintiff, a receiver of an insolvent estate, brought a suit to set aside a deed from the insolvent to his son, and a mortgage given by the son to certain creditors of the insolvent; alleging the deed to be without consideration, and the mortgage a fraudulent preference. Judgment was rendered for the defendants. Thereafter the plaintiff brought another suit to avoid the same deed, alleging that the son was a creditor of the father to the amount of \$1,200, and that the land was conveyed to him in payment of this debt, and was a fraudulent preference under the statute, and therefore void. The court (Mr. Justice BREWER presiding) held that the first judgment was a bar to the second, although the grounds of recovery were different. After quoting Mr. Pomeroy's analysis of the elements which constitute "a cause of action" (Pomeroy, *Rem. & Rights*, § 519), he says: "Now, what is the plaintiff's primary right, as alleged in these cases? Obviously, in each the same—the right to have the land; and the defendant's corresponding primary duty is to let him have the land; and the defendant's delict or wrongful act is the

failure to let him have the land. These exist in each case, and in each case alike. It is true, the basis of complainant's primary right is, as alleged, different in one case from that in the other; but this is mere difference, in the language of the supreme court, in 'the ground of recovery.' The mere fact that different testimony would be necessary to sustain the different allegations in the two bills does not of itself necessarily make two distinct causes of action. Take this illustration: Suppose a party bring suit to recover possession of real estate, and alleges in his complaint that he is the owner by virtue of a patent from the government. After a judgment against him, would he be permitted to maintain a second action, alleging that he was the owner by virtue of certain tax proceedings or by virtue of a judicial sale? Yet different testimony would be required to sustain his allegations in the two actions. In both of such actions plaintiff's primary right—that of possession based on ownership—would be the same, the only difference being in the ground of recovery. All the grounds of recovery, all the bases of plaintiff's title, must be present in the first action, or they are lost to him forever, exactly the same as when a party sued upon a note, and having several defenses, pleads only one—the balance are as though they never existed. The party who has his day in court must make his entire showing. He cannot support a claim or defense in different actions on different grounds."

The recent case of *United States v. California Land Co.* 192 U. S. 355 (24 Sup. Ct. 266), was a suit by the government for the purpose of having a certain patent of land declared void on the ground that the land was in Klamath Indian Reservation, and therefore not within the provisions of the grant to the company. One plea of the land company was that the plaintiff had filed an earlier bill against it to avoid the same patent, that it had pleaded

matter showing the patent to be valid, and that it was an innocent purchaser, and that a final decree on the merits had been rendered in its favor. The circuit court held the plea to be bad, but upon an appeal the supreme court reversed the case, holding that the former decree was a bar, although the grounds of recovery were essentially different, and it was urged that the plaintiff was suing in a different capacity from that in which it brought the first suit. The court, by Mr. Justice HOLMES, said: "On the general principle of our law, it is tolerably plain that the decree in the suit, under the foregoing statute, would be a bar. The parties, the subject-matter, and the relief sought all were the same. * * Here the plaintiff is the same person that brought the former bill, whatever the difference of the interests intended to be asserted. The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means; that is to say, by evidence that the lands originally were excepted from the grant. But in this as in the former suit it seeks to establish its own title to the fee. It may be the law in Scotland that a judgment is not a bar to a second attempt to reach the same result by a different *medium concludendi*. * * But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim. * * and *a fortiori* he cannot divide the grounds of recovery. Unless the statute of 1889 put the former suit upon a peculiar footing, the United States was bound then to bring forward all the grounds it had for declaring the patents void, and, when the bill was dismissed, was barred as to all by the decree." These two cases and the

principles applied are decisive of the present suit. The claim or demand of the defendant Union Street Railway Company in the suit brought by it was that the bank had no interest in the bonds, and they should be surrendered up for cancellation. The reasons why this should be done were not the cause of action or primary subject of inquiry. There may have been many reasons why the bonds should have been surrendered up and canceled, and why the bank could not enforce them as against the property of the railway company; but, if the plaintiff in that suit was content to rely upon only one of such reasons as a ground for recovery, the others are lost to it as completely as if they never existed.

2. The position that the decree in the former suit is a bar to the right of the plaintiff to foreclose the mortgage given to secure the payment of the bonds is untenable, because that matter was not germane to or connected with the cause of action or suit, and did not in any way affect the merits of the controversy then before the court for determination. The bank was not the owner of the bonds, but held them as collateral security for the debt of persons not parties to the suit. It was bound by the terms of the contract between it and the pledgors, and no decree of foreclosure could have been made in the former suit, because the proper parties were not before the court: *Union St. Ry. Co. v. First Nat. Bank*, 42 Or. 606 (72 Pac. 586, 73 Pac. 341).

The decree of the court below will therefore be reversed, and one entered here as prayed for in the complaint.

REVERSED.

Decided 19 December, 1904.

STATE v. BREAW.

[78 Pac. 896.]

CRIMINAL LAW — RIGHT TO TRIAL AT NEXT TERM.

1. The words "next term" in Section 1559, B. & C. Comp., providing that if a defendant whose trial has not been postponed on his application, or by his consent, be not brought "to trial at the next term of the court in which the indictment is triable, after it is found," the court must order the indictment dismissed, except for cause, do not include the current term at which the indictment was found, and hence defendant is not entitled to either a trial or a dismissal at that term.

APPEALABLE ORDER — POSTPONING CRIMINAL TRIAL.

2. The action of a trial court in postponing the trial of a criminal case to another term on the statement of the district attorney, as authorized by B. & C. Comp. § 1379, cannot be reviewed except for abuse of discretion.

From Baker: ROBERT EAKIN, Judge.

George W. Breaw was indicted for forgery, and from an order denying his motion for an immediate trial on certain of the indictments at the term at which they were returned, or for the dismissal thereof, he appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. John Langdon Rand*.

For respondent there was a brief over the names of *Leroy Lomax*, District Attorney, *William W. Cotton*, and *James G. Wilson*, with an oral argument by *Mr. Andrew M. Crawford*, Attorney General, and *Mr. Wilson*.

MR. JUSTICE BEAN delivered the opinion.

This is an appeal from an order refusing to dismiss an information in a criminal action, under Section 1559 of the Code, which reads as follows: "If a defendant indicted for a crime, whose trial has not been postponed upon his application or by his consent, be not brought to trial at the next term of the court in which the indictment is triable, after it is found, the court must order the indictment to be dismissed, unless good cause to the contrary be shown." The defendant was arrested in August, 1903,

and held to await the action of the grand jury, at the next term of the Baker County circuit court, for the crimes of embezzlement and forgery. On the first day of the term the district attorney filed nine informations against him for forgery. He was tried and acquitted on two of them, and moved for a trial on the others at the same term, or the dismissal thereof. This motion was overruled, and the causes continued until the next term, without the reasons for such continuance being entered of record. From the order in one case he appeals, and there is a stipulation that the others shall abide the result.

1. The defendant's position is that under the statute he was entitled to a dismissal of the information against him if he was not tried at the same term of the court at which it was found, unless good cause to the contrary was shown by the prosecution, and that such cause should appear in the record. Section 10 of article I of the state constitution declares that justice shall be administered without delay, which is substantially the same as guarantying to a defendant in a criminal action a speedy trial. The statute quoted is intended to preserve this right by prescribing a definite and uniform rule for the guidance of courts in their practice, but we do not think it means that the trial shall take place at the same term at which the indictment is found or the information filed. The language is that the court must order the indictment dismissed if the trial has not been postponed on the application or by the consent of the defendant, unless he is brought "to trial at the next term of the court in which the indictment is triable, after it is found," etc., which clearly means the next following term, and not the current one. The interpretation of the statute should be reasonable, adapted to the objects to be attained, and to the preservation of the rights of the State and of the accused. It would be unreasonable to hold

that a term of court just closing at the time an indictment is returned should be regarded as the "next term" after it was found, so as to impose upon the State the charge of vexatious or oppressive delay if the trial is not had at such term. If the term just closing is not to be counted, upon what principle can a term, any part of which has expired, be included? How much of a term should remain to entitle it to be counted as a term? And who shall determine this question? Evidently the statute was intended to establish a uniform rule applicable to all cases alike, and by the words "next term" to exclude the current term from the computation: 12 Cyc. 502; *Bell's Case*, 7 Grat. 646; *Sands v. Commonwealth*, 20 Grat. 800; *Ochs v. People*, 25 Ill. App. 379; *Stewart v. State*, 13 Ark. 720. This conclusion, of course, does not affect the duty of the prosecution or the right of a defendant in a criminal action to a trial as soon after the information or indictment is filed as the prosecution can with reasonable diligence prepare for the trial, and the delays growing out of the established method of procedure will permit; but he is not entitled to a dismissal of the indictment under the section referred to, although he is not tried at the term at which the information is filed against him, and no cause for the delay appears on record.

2. The court has authority to postpone a trial of a criminal cause until another day in the same term, or to another term, upon the statement of the district attorney (B. & C. Comp. § 1379), and its action in so doing cannot be reviewed on appeal, except for an abuse of discretion: *State v. O'Neil*, 13 Or. 183, 9 Pac. 284.

The judgment of the court below is affirmed.

AFFIRMED.

Argued 26 October, decided 12 December, 1904.

MACDONALD v. O'REILLY.

[78 Pac. 753.]

DUTY OF PARENTS TO CHILDREN — IMPUTED NEGLIGENCE.

1. In view of Sections 512 and 513, B. & C. Comp., under which the parents share equally and independently of each other in the care and custody of their children, neither is the agent of the other, nor can the negligence of one be imputed to the other, in actions for damages resulting from injuring or killing their child: *Hedin v. Suburban Ry. Co.* 26 Or. 155, distinguished.

AGE OF DISCRETION IN CHILD.

2. A child four and a half years old has not as a matter of law sufficient judgment or intelligence to be capable of negligence.

EXAMPLE OF ONE NOT AN INDEPENDENT CONTRACTOR.*

3. In an action for the death of a child while at play, resulting from the fall of timbers alleged to have been negligently piled in the street near the home of the deceased, the mere fact that the defendant, as owner of the timbers, paid a teamster to haul them to the premises, is insufficient to constitute the teamster an independent contractor, so as to relieve the defendant from liability for the manner in which the timbers were piled.

LIABILITY OF INDEPENDENT CONTRACTOR.

4. In an action for the death of a child from the fall of timbers alleged to have been negligently piled in the street, where it appeared that the timbers were for the use of independent contractors, who were engaged at the time of the accident in preparing to begin work, but that the defendant, as owner of the premises and the timbers, had them hauled there, a charge that if the accident happened from the unsafe condition in which the timbers were left on the ground by defendant, and before possession thereof was taken by the contractors, the defendant would be responsible, but if the contractors had taken control of the timbers, and had

* NOTE.—See the following cases on this subject:

St. Louis, I. M. & S. Ry. Co. v. Yonly, 9 L. R. A. 604, with note, Liability of Railroad Company for Negligence of Independent Contractor; *Hawver v. Whalen*, 14 L. R. A. 828, with note, Exceptions to the Rule of Liability of Employer for Acts of an Independent Contractor; *Sanford v. Pawtucket St. Ry. Co.* 33 L. R. A. 564, with briefs and short collection of cases in footnote; *Boomer v. Wilbur*, 53 L. R. A. 172, with footnote references; *Pingree v. Michigan Cent. R. Co.* 53 L. R. A. 285, with collection of cases; *Uppington v. New York*, 53 L. R. A. 550, and cases cited in footnote; *Richmond v. Stutterding*, 65 L. R. A. 445, and *Central C. & I. Co. v. Grider*, 65 L. R. A. 455, with monographic note, Persons Deemed to be Independent Contractors Within the Meaning of the Rule Relieving the Employer From Liability, pp. 445-508.

Read *Brown v. Smith*, 22 Am. St. Rep. 456, with part of note on p. 463; *Engle v. Eureka Club*, 33 Am. St. Rep. 692, with collection of authorities on Liability for Negligence of Independent Contractor; *First Presby. Congreg. v. Smith*, 43 Am. St. Rep. 808, followed by a collection of authorities as to Employer's Liability to Third Person for Independent Contractor's Negligence; *Smith v. Milwaukee B. & E. Exch.* 51 Am. St. Rep. 912, with note, Negligence of Independent Contractor; *Covington & C. Bridge Co. v. Steinbrock*, 76 Am. St. Rep. 375, with monographic note, pp. 382-428, Liability for Negligence and Other Torts of Independent Contractors, and note in 98 Am. St. Rep. 309, on Liability of One Furnishing Appliances to an Independent Contractor.

REPORTER.

negligently put them in an unsafe condition, or if they were responsible for their being in such condition, they, and not the defendant, would be liable for the accident, was a correct statement of the law.

HARMLESS ERROR — PHOTOGRAPHS AS EVIDENCE.*

5. In an action for the death of a child from the fall of timbers alleged to have been negligently piled in the street, any error in the admission in evidence of photographs of the premises, taken the day following the accident, showing the premises as they were before the accident, with the exception of the timbers was harmless.

From Multnomah: ARTHUR L. FRAZER, Judge.

Action by Frederick D. Macdonald, administrator of the estate of Maurice R. Macdonald, deceased, against Drake C. O'Reilly. From a judgment for plaintiff, defendant appeals. AFFIRMED.

For appellant there was a brief over the names of *Williams, Wood & Linthicum* and *Rodney L. Glisan*, with an oral argument by *Mr. Chas. E. S. Wood* and *Mr. Glisan*.

For respondent there was a brief and an oral argument by *Mr. Henry E. McGinn*.

MR. JUSTICE BEAN delivered the opinion.

This is a statutory action for damages for the death of an infant aged four years and six months. The plaintiff is the father of the child, and sues as administrator of his estate. On March 19, 1903, while the boy was playing with other children on a pile of round sticks or piles in the street in front of the defendant's property, the piling rolled down and crushed him, causing his instant death. The piles belonged to O'Reilly, and, with the consent of the city authorities, were placed in the street by him, or at his direction, to be subsequently used in the construction of a building on his premises adjacent thereto. The defendant had contracted with a pile-driving firm for the driving of the piles, and it was engaged at the time of the accident in making preparations for beginning its work.

*NOTE.—See *State v. Miller*, 43 Or. 326, and cases cited in foot note.

O'Reilly was to furnish and deliver the piles on the ground or in the street adjoining. He purchased them from the county, received them at the river, and contracted with C. J. Cook & Co., at a certain price per foot, to haul them to his premises. Cook & Co. unloaded the piles in the street next to O'Reilly's property, with his knowledge and in pursuance of his instructions, where they remained several weeks prior to the accident. When they were piled in the street they were supported on one side by a billboard, but it was removed a few days prior to the accident by parties engaged in excavating for the foundation of O'Reilly's building. The child lived with his parents about half a block distant from O'Reilly's property, and had previously been warned, in the presence and hearing of his mother, to keep away from that vicinity. The plaintiff had a verdict and judgment, and the defendant appeals, assigning error, *first*, in instructing the jury that the negligence of the mother, if any, in permitting the child to play in the street, and in not taking proper care of him, can be no defense to this action; *second*, that the child was *non sui juris*, and could not, therefore, be guilty of contributory negligence; and, *third*, in instructing the jury as to the rule governing the liability of an independent contractor.

The briefs of both sides contain unusually full and able arguments on the general question of imputed negligence, and as to when and under what circumstances the negligence of the legal custodian of a person *non sui juris*, contributing to his injury or death, will be imputed to such person or his beneficiary in an action to recover damages therefor. It is agreed by counsel that, according to the great weight of modern authority, the negligence of the legal custodian of such a person will not be imputed to it or bar an action for or on its behalf, and that the doctrine of *Hartfield v. Roper*, 21 Wend. 615 (34 Am. Dec. 273), has

not stood the test of reason. For a full discussion of this question, with a collation of authorities, see Beach, Contrib. Neg. (2 ed.) § 119 *et seq.*; 1 Thompson, Negligence, § 293; Tiffany, Death by Wrongful Act, § 68; 14 Am. Law Rev. 770; 17 Cent. Law J. 243; 23 Cent. Law J. 459; *Bamberger v. Citizens' St. Ry. Co.* 95 Tenn. 18 (31 S. W. 163, 28 L. R. A. 486, 49 Am. St. Rep. 909); *Atlanta & C. A. L. Ry. Co. v. Gravitt*, 93 Ga. 369 (20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145). But counsel disagree radically as to whether, in an action brought under our statute by a father, as administrator of the estate of his minor child, to recover damages for his death, the negligence of the father will be a bar. Defendant insists that since the father is by law the sole heir of his child, and will inherit his estate, he is in fact the real party in interest, and his contributory negligence ought to bar a recovery on the ground that he should not be permitted to profit by his own wrong. The position of the plaintiff, on the other hand, is that, since the right of action for the negligent injury or death of a person, by our statute, is given to his administrator for the benefit of his estate, and not, as in most other jurisdictions, for the benefit of certain designated persons, and since the recovery, if any, is to be administered as other assets of the estate (B. & C. Comp. § 381; *Carlson v. Oregon R. & Nav. Co.* 21 Or. 450, 28 Pac. 497; *Schleiger v. Northern Term. Co.* 43 Or. 4, 72 Pac. 324), the interest of the father as heir is so remote that his contributory negligence should be no defense.

It is not necessary for us to decide this question, interesting and important as it is. There was no evidence whatever on the trial that the plaintiff's negligence contributed to the death of his minor child, and there is no sufficient ground upon which the negligence of the mother can be imputed to the father, any more than the negligence of the parents can be imputed to the child.

1. The primary subject of inquiry in all personal injury actions is whether the negligence of the defendant was the proximate cause of the injury. When that fact is proven, and that the plaintiff was damaged thereby, the liability of the defendant is established. The plaintiff may not be entitled to recover, however, because of the concurring negligence of himself, or of some one standing in his place, contributing to the injury, for the reason that the law will not undertake to apportion the negligence. But the contributory negligence which will bar a recovery must be that of the person from whom the cause of action is derived, or the beneficiary, or some one standing in such a relation to the beneficiary that the maxim, *Qui facit per alium facit per se*, may be invoked: 16 Am. & Eng. Enc. (1 ed.) 447. A wife does not, from the mere marital relation, however, occupy such a position in the care and custody of a minor child. Under our statute, the right and responsibility of the parents in that regard are equal, and the mother is as fully entitled to the custody and care of the children as the father: B. & C. Comp. §§ 512, 513. The doctrine to be found in some of the books, therefore, that because the father is the legal custodian of the children, or because of the identity of the parents, the law will assume that the mother is the agent of the father, for whose negligence he is responsible, can have no application. A mother is not the agent of the father in the care of the children, any more than the father is the agent of the mother. They are both equal before the law. The common interest or common duty of the parents toward the children will not of itself make one the agent of the other, or responsible for that other's negligence. Such seems to be the result of the decided cases in states where the doctrine of imputed negligence is not recognized.

Thus *Donk Coal Co. v. Leavitt*, 109 Ill. App. 385, was an action by the father, as administrator of the estate of his son, a child of three years, to recover for his death, caused by the negligence of the defendant in maintaining an open cistern on its premises. One of the defenses was that the accident was due to the contributory negligence of the mother, who had the care and custody of the child at the time. The court held that such negligence was no defense, saying: "The action is brought for the benefit of the father as well as for the benefit of the mother, as the statute and the decisions of the supreme court in the interpretation thereof provide. * * Appellee, the father, was not present. His absence was in the discharge of duties which he owed to his wife and child, no less than toward appellant. There is no way of charging him with evidence even tending to prove his contributory negligence. He does not derive his right in the premises through the acts or omissions of his wife, but through the rights of his child and the negligence of appellant."

Atlanta & C. A. L. Ry. Co. v. Gravitt, 93 Ga. 369 (20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145), was an action by a mother to recover damages for the death of her child, occurring under circumstances of concurring negligence on the part of the custodian of the child selected by the father, and the defendant. In the light of the facts, the court said that the father would be precluded from recovery, and that as to him the case was the same as if he himself "had deliberately led his son into the death trap," but that the custodian of the child was not the agent of the mother, although selected by the father with her knowledge and without protest, nor would the negligence of her husband be imputed to her. This case, although criticised by counsel for the plaintiff, is, to our minds, a remarkably full and able discussion of the entire doctrine of imputed negligence and the grounds upon which it is

based. All the authorities on the question up to the time of that decision seem to be referred to and commented upon, and the conclusion reached is that the identity or common interest of the husband and wife is not sufficient to make the husband the agent of the wife in the care of the child, and that he is not to be regarded as such agent unless "she expressly constituted him her agent for the purpose in hand." After considering at length the authorities bearing directly on the question as to whether the negligence of the husband can be imputed to the wife, Mr. Justice LUMPKIN concludes: "Under the facts of the present case, the father was in no sense acting as the agent of, or in any manner representing, his wife. Only upon the idea of identity of interest could the act of one be regarded as that of the other. We have already shown that the rule which once obtained, whereby, upon the theory of identity or agency, the negligence of a father was imputed to his infant child, has been utterly repudiated in most jurisdictions, and no longer has any firm footing in the law of this country. The same reasons which have been urged against the injustice and harshness of that rule apply equally well to so indefensible a doctrine as that which would seek to charge a wife with the negligence of her husband, simply because of the marital relation existing between the two. Like the child, the wife has distinct, individual legal rights, which cannot be defeated simply by showing that another, to whom she was related by the ties of wedlock, but over whom she exercised at the time no control, was guilty of negligence concurrent with that of the defendant. Incidentally, the husband might derive some benefit from a recovery by her; indeed, upon her death, might inherit her estate, including the money so recovered. This, however, would likewise be true in a case where a child was allowed to recover despite the negligence of its father, and yet this

is universally held not to be a sufficient reason for unjustly depriving the child of its legal rights as against a wrongdoer entitled to no protection whatsoever as to liability growing out of his own gross misconduct. It would seem that the efforts on the part of the courts of an earlier day to formulate rules which would extend the doctrine of imputable negligence so as to include persons other than those who actually sustained towards each other the relation of master and servant, or principal and agent, or who were jointly engaged in the prosecution of a common enterprise, have proved to be entirely unsuccessful legal ventures. Such rules have already met the fate which must inevitably sooner or later have befallen them, for they stand upon no foundation of logic, wisdom, or justice."

Davis v. Guarnieri, 45 Ohio St. 470 (15 N. E. 350, 4 Am. St. Rep. 548), was an action by a husband, as administrator of his wife's estate, against a druggist who had given a dangerous drug by mistake to the husband, which drug the husband had administered to his wife, causing death. The defendant set up contributory negligence on the part of the husband, and the court held that the doctrine of imputed negligence did not prevail in Ohio, and that contributory negligence of the husband in purchasing the drug would not be imputed to the wife in an action by her or her administrator against the dealer for injury or death resulting from the use of such drug, unless "she constituted him her agent," and that by simply making known to her husband her desire for the medicine, by reason of which he obtained it, she did not make him her agent in such sense that his contributory negligence in making the purchase could be imputed to her: *Louisville N. A. etc. R. Co. v. Creek*, 130 Ind. 139 (29 N. E. 481, 14 L. R. A. 733), was an action by a husband as administrator of his wife's estate. She was killed at a railway crossing while driving with her husband, the husband's negligence

contributing to the disaster. The court ruled that the negligence of the husband could not be imputed to the wife, and was no defense, saying: "A husband and wife may undoubtedly sustain such relations to each other in a given case that the negligence of one will be imputed to the other. The mere existence of the marital relation, however, will not have that effect. In our opinion, there would be no more reason or justice in a rule that would in cases of this character inflict upon a wife the consequences of her husband's negligence, solely and alone because of that relationship, than to hold her accountable at the bar of eternal justice for his sins because she was his wife." That the negligence of one member of the family will not be imputed to another is applied in actions under statutes giving a right of action for death by wrongful act for the benefit of the parents or next of kin, it being held in such cases that the negligence of one of the beneficiaries cannot be imputed to the others or bar a recovery: *Cleveland C. & C. Ry. Co. v. Crawford*, 24 Ohio St. 631 (15 Am Rep. 633); *Davis v. Guarnieri*, 45 Ohio St. 470 (15 N. E. 350, 4 Am. St. Rep. 548); *Wolf v. Lake Erie & W. R. Co.* 55 Ohio St. 517 (45 N. E. 708, 36 L. R. A. 812).

The principle underlying all these cases is, as already stated, that contributory negligence, in order to be a defense, must be that of a person through whom the cause of action is derived, or for whose benefit it is prosecuted, or some authorized agent or representative. Or perhaps as better said by Mr. Justice MITCHELL in *Town of Knightstown v. Musgrove*, 116 Ind. 121 (18 N. E. 452, 9 Am. St. Rep. 827): "Before the concurrent negligence of a third person can be interposed to shield another, whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such a relation to each other in respect to the matter then in

progress as that, in contemplation of law, the negligent act of the third person was, upon the principles of agency, or coöperation in a common or joint enterprise, the act of the person injured. Until such agency or identity of interest or purpose appears, there is no sound principle upon which it can be held that one who is himself blameless, and is yet injured by the concurrent wrong of two persons, shall not have his remedy against one who neglected a positive duty which the law enjoined upon him." Such agency will not be inferred from the mere marital relation of husband and wife. If the negligence of the mother will not be imputed to her infant child, so as to bar an action by or on behalf of the child, there is certainly no reason why it should be imputed to her husband, and defeat an action by him. If the father suffers damages by the injury or death of his infant child, caused by the negligence of another, to which he himself in no way contributed, there is no reason why he should be deprived of the benefit of recovery, or the negligent party should avoid responsibility, because of the concurring negligence of his wife, who, under the law, is entitled to the custody of the child equally with himself, nor why, if a mother is likewise damaged, and has a right of action therefor, it should be barred by the negligence of the father. We are of the opinion, therefore, that the negligence of the mother, if any, in the case at bar, could not be legally imputed to the plaintiff, and the court did not err in so instructing the jury.

This point was not made in *Hedin v. Suburban Ry. Co.* 26 Or. 155 (37 Pac. 540), and, of course, that decision is not an authority one way or the other. The cases cited by the appellant, holding that the negligence of the mother will be imputed to the father, are all, we believe, from states where the doctrine of imputed negligence, in one form or another, existed at the time the decisions cited were made: *Higgins v. Deeney*, 78 Cal. 578 (21 Pac. 428);

Toledo, etc. R. Co. v. Grable, 88 Ill. 443; *Toner's Adm'r v. South Covington St. R. Co.* 109 Ky. 41 (58 S. W. 439); *Grant v. Fitchburg*, 160 Mass. 16 (35 N. E. 84, 39 Am. St. Rep. 449); *Power's Adm'r v. Quincy, etc. R. Co.* 163 Mass. 5 (39 N. E. 345); *Gunderson v. Northwestern Elev. Co.* 47 Minn. 161 (49 N. W. 694); *Ihl v. Forty-Second St. R. Co.* 47 N. Y. 317 (7 Am. Rep. 450).

2. It is unimportant, we take it, whether, as an academic question, the courts can properly hold that an infant child of any given age is, as a matter of law, *non sui juris*, or whether that question is always one of fact. There has been a time in the life of every person of mature judgment, as all agree, when he was incapable of exercising the care and judgment necessary to avoid or avert danger, and was *non sui juris*. There is a time, also, when he is, in law, an adult, and responsible as such. Between these two periods is a transition stage, during which his capacity is a matter of fact for the jury: *Dubiver v. City Ry. Co.* 44 Or. 227 (74 Pac. 915, 75 Pac. 693). What age is sufficient to constitute a child *sui juris* is a difficult question, and has been a fruitful source of controversy in the courts, and no definite or fixed age has ever, so far as we are advised, been agreed upon. Unless the child is of very tender years, the question is ordinarily left to the jury to determine the measure of care required by that particular child under the circumstances of the case: 1 Thompson, Negligence, § 313. But whatever the rule may be, no one will, we apprehend, contend that a child of the age of plaintiff's intestate — four and one half years — has reached such a degree of judgment, intelligence, or discretion as to be deemed capable of negligence in playing on a pile of lumber or timber left in the public street near his home. The court therefore properly so declared to the jury, even if the question is one of fact: *State v. Morey*, 25 Or. 244 (35 Pac. 655, 36 Pac. 573). And if it was one of law, there

was no error in the instruction as given. There are abundant cases holding that children under five years of age are *non sui juris*, and incapable of negligence, as a matter of law: Beach, Contrib. Neg. § 117; 1 Thompson, Negligence, § 310; *Bay Shore R. Co. v. Harris*, 67 Ala. 6; *Chicago & A. R. Co. v. Gregory*, 58 Ill. 226; *Schnur v. Citizens' Trac. Co.* 153 Pa. 29 (25 Atl. 650, 34 Am. St. Rep. 680); *Evers v. Philadelphia Trac. Co.* 176 Pa. 376 (35 Atl. 140, 53 Am. St. Rep. 674); *Hoon v. Beaver Valley Trac. Co.* 204 Pa. 369 (54 Atl. 270).

3. The law is that where one contracts with another to do work which may be done in a lawful manner, and has no choice in the selection of the workmen, and no control over the manner of doing the work, except as to the result to be obtained, he will not, as a general rule, be liable for the negligence of the contractor or his servants, because the doctrine *respondeat superior* will not apply: 2 Dillon, Munic. Corp. (4 ed.) § 1028; *Blumb v. City of Kansas*, 84 Mo. 112 (54 Am. Rep. 87); *Long v. Moon*, 107 Mo. 334 (17 S. W. 810); *Bibb's Adm'r v. Norfolk & W. R. Co.* 87 Va. 711 (14 S. E. 163). As we understand the record, however, the liability of an independent contractor was not involved in this case, unless the pile-driving contractor had taken possession of, and was responsible for the condition of, the piles at the time. The piles belonged to the defendant, and were by his direction placed in the street, where they remained three or four weeks prior to the accident. Because he paid the teamster at a certain rate per foot for hauling them from the river did not exonerate the defendant from liability for the manner in which the piles were placed in the street, any more than if he had been paid by the day.

4. Nor did the fact that the defendant had previously let the contract to a pile-driving firm to drive the piles make such contractor liable for the injury caused by the

negligent manner in which they were piled in the street, unless the firm was responsible therefor. Upon this question the court charged the jury, in substance, that if the accident happened from the unsafe condition in which the piles were left on the ground by defendant, and before possession thereof was taken by the pile-driving contractor, the defendant would be responsible, but if the contracting firm had taken the control of the piles, and had negligently put them in an unsafe condition, or if it was responsible for their being in such a condition, it, and not the defendant, would be liable for the accident. This is all the defendant could ask or expect. The court submitted to the jury as a question of fact whether the negligence of the defendant or that of the contractor was the proximate cause of the injury.

5. The photographs offered and admitted in evidence on behalf of the plaintiff were taken on the day following the accident. The testimony shows that they were exact reproductions of the premises as they were before the accident, with the exception of the logs or piling, which had been rolled down by some of the employés of the pile-driving contractor. These photographs were not a true representation of the condition of the piling at the time of the accident, but it was impossible for them to have misled the jury or to have prejudiced the rights of the defendant in any way, and therefore their admission was harmless.

The judgment of the court below will be affirmed.

AFFIRMED.

Decided 19 December, 1904; decided on rehearing 19 June, 1905.

STATE v. ROGOWAY.

[78 Pac. 987, 81 Pac. 234.]

ADMISSIBILITY OF CONFESSIONS — PRACTICE.

1. The determination of the court on a criminal trial that a confession of defendant was obtained from him without the influence of hope or fear exercised

by a third person, will not be disturbed on review unless there is clear and manifest error.

ARSON — CORPUS DELICTI — CORROBORATION OF CONFESSION.

2. On a prosecution for arson, where the building described in the indictment is conceded to have been burned, and there is some evidence that it was of incendiary origin, the *corpus delicti* is sufficiently shown to render defendant's confession admissible.

LIMITING ARGUMENT OF COUNSEL — CONSTITUTIONAL RIGHT TO TIME FOR FULL PRESENTATION OF CASE.*

3. The right to a full hearing of his case by counsel being secured to every defendant by Section 11 of the Oregon Bill of Rights and the Sixth Amendment to the Constitution of the United States, the trial court cannot arbitrarily limit the time for argument in a criminal case to a period within which no fair or comprehensive review of the evidence can be given — though it is the right of the trial judge to exercise such a supervision over the argument as will prevent an abuse of the right guaranteed.

EXAMPLE OF ABUSE OF DISCRETION IN LIMITING ARGUMENT.

4. When a criminal trial has required three days, during which twenty witnesses were examined and fifty exhibits were introduced, the evidence being circumstantial and conflicting, it is reversible error to limit defendant's counsel to only one hour in argument.

From Linn : GEORGE H. BURNETT, Judge.

Oscar Rogoway was convicted of arson and appealed.

REVERSED.

For appellant there was a brief over the names of *Hewitt & Sox*, and *J. J. Whitney*, with an oral argument by *Mr. Henry H. Hewitt*, and *Mr. Whitney*.

For the State there was a brief over the names of *John H. McNary*, District Attorney, *Gale S. Hill*, and *Chas. L. McNary*, with an oral argument by *Mr. Andrew M. Crawford*, Attorney General, and *Mr. C. L. McNary*.

MR. JUSTICE BEAN delivered the opinion of the court.

The defendant was convicted of the crime of arson by burning a building in the town of Lebanon occupied in part by his mother as a storeroom. From a judgment sentencing him to the penitentiary, he appeals. The fire occurred on Sunday night or Monday morning, about twelve or one o'clock. The building destroyed was a two-

NOTE.— See extended note in 46 Am. St. Rep. 23, Limitations Upon Argument of Counsel. REPORTER.

story structure. There were three main rooms on the first floor, two of which were occupied by Jennings Bros. for saloon purposes, and the other by defendant's mother as a dry goods store. Back of the saloon was a small cardroom used by the Jennings Bros. in connection with their saloon, separated by a wooden partition from that part of the building occupied by defendant's mother as a storeroom. Back of the storeroom, and adjoining the cardroom, was a small room occupied by the defendant and his brother-in-law as a sleeping room and for storing boxes and the like. Defendant's mother had been in business about six weeks at the time of the fire. She did not reside at Lebanon, but the store had been in charge of a son-in-law of hers by the name of Gross. The stock of goods consisted, according to the testimony of the State, principally of shopworn and secondhand articles, that at the time of the fire were not worth to exceed \$200, while it was insured for \$500, and a previous policy for \$600 had been canceled by the insurance company. About three weeks before the fire the defendant came from San Francisco to Lebanon to assist Gross in the store. After his arrival it was their usual practice, as it had been Gross' before, to drive over to Albany after the week's business was over on Saturday night, and remain until Monday morning. On the day before the fire, however, for some reason unexplained, Gross went to Albany as usual, but the defendant remained in Lebanon. During Sunday he was back and forth between the place of business of a Mr. Turner, near by, and his mother's store, and Turner says he noticed he was "a little fidgety." He was last seen in Turner's store some time between nine and eleven o'clock Sunday night. About twelve o'clock, or a little after, he rushed out into the street, partly dressed, and gave the alarm of fire. The evidence of parties who were early at the fire tends to show that it

originated in that part of the building occupied by defendant's mother, and in the room occupied by him as a sleeping room. The defendant assisted in the endeavor to extinguish the fire as long as his services were of any use, and then engaged a room at a hotel and went to bed.

About four or five o'clock in the morning he was aroused from his sleep, as he testifies, by two persons, one of whom he recognized as a "twenty-one" dealer at Jennings Bros. saloon, and told that he was wanted at the telephone office. He immediately got up, dressed, and went to the office, but it was locked. As to what occurred afterward and the circumstances surrounding the alleged confession are thus detailed by the parties present: Andy Jennings says that, about four or five o'clock on the morning after the fire, "Me and my brother was standing in front of the St. Charles Hotel. We was standing there talking, wondering what we would do in the morning; watching our goods. We were standing there talking, and I looked down and see Rogoway come out of the door of the St. Charles, and I said, 'There goes that Rogoway now.' He went down toward the 'phone office. My brother said, 'I believe I'll go down and see where he is going,' I said, 'Yes.' At that time I was on crutches. I could not walk as fast as he could. By the time I got down, Rogoway was coming out of the 'phone office door. My brother met him. I don't know what was said. My brother got there before I did.

* * Just at that time Mr. Irwin—and I would not be sure whether Mr. Irwin and Elkins came together, they came down the street, and my brother said, 'Rogoway, come walk down the street. I would like to talk to you.' He said, 'All right, boys.' My brother turns around to the other boys and said, 'Boys, come walk down with us.' We all struck out down the street, starting from the 'phone office. * * Down to Lamberson's corner. * * My brother done the talking to him. He says, 'Mr. Rogoway, what do

you know about the fire?' He says, 'Boys, I don't know anything about it.' My brother says to him, 'You needn't talk that way. I know better. We are satisfied that you know all about it, and every one in town does, and you might just as well go ahead and tell what you know about this.' He stood there quite a bit with his head down. My brother kept on talking in that manner. Pretty soon he said, 'Boys, I did do that.' "

Mr. Irwin says that about four or five o'clock in the morning after the fire he was standing in front of the St. Charles Hotel, and that he saw the defendant coming down the street; that Mr. Andy Jennings came along about that time, and Mr. Luke Jennings was there, and Andy said, "'Better go down and see what he has to say,' so we went down. Luke was standing there in front of the telephone office, and Andy and Mr. Elkins;" and that Luke Jennings asked him to step down from the door, and he refused to come at first, but then walked down, and "Jennings asked us to come along and hear what was said." He says that no conversation was held while going from the telephone office to Lamberson's corner. Jennings asked Rogoway what he knew about the fire, and he said that he did not know anything; and Jennings told him that he and everybody in town knew that he burned the store, and Rogoway finally said, "Well, I burned it." "We asked him if he used oil, and he said he didn't; he used paper. Asked him why he burned it. He said, 'For Mr. Gross.' Asked him what he burned it for. He said, 'For the insurance.' Asked him what he got out of it. He said he didn't know." Elkins says that about four or five o'clock in the morning he, in company with a man by the name of Lutz, started to go home, and just then he saw Rogoway go by; that Irwin was there, and he said, "Let's go down and see where he is going"; that when he and the others came there, Luke Jennings says to the defendant,

"Come down here. I want to see you"; and Andy says, "Let's go down, boys, and see what he has to say"; that after they got around Lamberson's corner, Luke says, "'Tell us what you know about this fire,' and he kind of hung his head. He says, 'Tell us what you know about this fire.' He said he didn't know anything. He said, 'We know you do, and everybody else does. You might just as well say you did this. We know it.' He hung his head a bit, and after a little he said he did it." He also says that Jennings then asked him if he would tell the same story to the recorder, and he said that he would; that the defendant was then taken to the recorder's office, where he made the same statement in the presence of the recorder and city marshal, and was by the recorder committed to jail.

1. Each of these witnesses testifies that there was no force or threats used to extort the statement or confession from the defendant, and no inducement was held out, but that it was a voluntary act on his part. There is testimony, not necessary to particularize, on behalf of the defendant, tending to show that the confession was extorted from him in pursuance of a previously conceived plan of the Jennings brothers, Irwin and Elkins, and perhaps other parties; but the effect of this testimony, so far as the competency of the confession is concerned, was to contradict the evidence of the State tending to show that such confession was a voluntary act, and was therefore for the consideration of the trial court, in determining whether such confessions should be admitted in evidence. It is the settled law in this State that when, upon the trial of a criminal cause, a confession of the defendant is offered in evidence, it becomes necessary for the trial court to ascertain and determine, preliminary to its admission, whether the confession is competent, and was obtained from the defendant free from the influence of hope or

fear exercised by a third person over the prisoner's mind : *State v. Moran*, 15 Or. 262 (14 Pac. 419). This is an inquiry addressed to the court, and its determination thereof will not be disturbed on an appeal unless there is clear and manifest error. "Whether the confession of the prisoner was voluntary or not," says the Supreme Court of New Hampshire in *State v. Squires*, 48 N. H. 364, erroneously cited as 48 Cal. in the Moran Case, "is purely a question of fact—as much so as the question whether a witness offered to testify was interested or not, or whether a witness was qualified to testify as an expert, or whether the loss of a paper has been shown, so as to allow the introduction of secondary evidence of its contents. In this and the like cases the judge who tries the cause must decide, although in some instances he may submit the question of fact to the jury. In either case, whether the decision be by the judge alone, or it be also passed upon by the jury, no exception lies, so far as the question is one of fact." And again, in *Fife v. Commonwealth*, 29 Pa. 429, 437, Mr. Chief Justice LEWIS says: "But the principle is well settled that where the admissibility of evidence depends upon a preliminary question of fact, to be tried by the court, its decision is not to be reversed unless in a case of clear and manifest error. The court that sees and hears the witnesses must be presumed to have better means of judging on a question of fact, than the appellate tribunal, where the witnesses are neither seen nor heard, and where it often happens that their testimony is very imperfectly reported." Now, in this case the evidence for the State tended to show that the alleged confession of the defendant was voluntarily made; and, while this evidence is controverted and contradicted, there is not sufficient in the record to justify this court in saying that the trial court erred in holding that the confession was competent and admissible as testimony. The admissibility of the testi-

mony was for the court, and its credibility and weight were for the jury, and were properly submitted to them.

2. It is also argued that there was no sufficient proof of the *corpus delicti* to entitle such confession to admission in evidence. "The *corpus delicti* is made up, * * " says Mr. Best, "of two things: *First*, certain facts forming its basis; and, *secondly*, the existence of criminal agency as the cause of them": Best, Evidence (ed. 1883), § 442. See, also, 7 Am. & Eng. Enc. Law (2 ed.), 861; 6 Am. & Eng. Enc. Law (2 ed.), 582, "Confessions," and numerous cases cited in the notes. Where the fact forming the basis of the *corpus delicti* is proven or admitted, the criminal agency may be shown by circumstantial evidence; and in this connection a distinction is to be made between the evidence which would justify a conviction, and that degree of proof of criminal agency necessary to let in evidence of the confessions or admissions of the defendant. To justify a conviction, of course, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, and of every fact necessary to constitute the offense; but it is not necessary, after the fact forming the basis of the *corpus delicti* is shown, that the evidence of the criminal agency should be of that conclusive character, in order to justify the admission of defendant's confession. Mr. Justice CLIFFORD, in *United States v. Williams*, 1 Cliff. 5 (Fed. Cas. No. 16707), speaking to this question, and commenting on the language used in Greenleaf's Evidence, said: "Considering the language employed by that author, it is somewhat doubtful how far he would carry the doctrine; and, if it is to the extent that the *corpus delicti* must be fully proved independently of the confession, we are not prepared to adopt it, as in that view the admission of the confession would be useless, except to prove the agency of the accused, and would operate as an exclusion of the confession for any other purpose, whereas,

if freely and voluntarily made, it is clearly admissible as evidence in support of any element in the charge to which it applies. Full proof of the body of the crime — the *corpus delicti* — independently of the confession is not required, says NELSON, C. J., in *People v. Badgley*, 16 Wend. '59, by any of the cases, and in many of them slight corroborating facts were held sufficient." Mr. Justice PAXSON, in *Gray v. Commonwealth*, 101 Pa. 380 (47 Am. Rep. 733), says: "The true rule in such cases is believed to be this: When the commonwealth has given sufficient evidence of the *corpus delicti* to entitle the case to go to the jury, it is competent to show a confession made by the prisoner, connecting him with the crime." *Sam v. State*, 33 Miss. 347, was a prosecution for arson, and the objection was made that the *corpus delicti* was not sufficiently proven to warrant an admission of the confessions of the prisoner. The court said: "The main fact necessary to be established as the basis of the prosecution was that the house had been burned, for without that there could be no guilt in any one. After proof of that fact, it was necessary to prove how it was done, and by whom; and these particulars could be established by any evidence which was competent in law, and sufficient in its force to satisfy the mind. The rule with regard to proof of the *corpus delicti*, apart from the mere confessions of the accused, proceeds upon the reason that the general fact, without which there could be no guilt either in the accused or in any one else, must be established before any one could be convicted of the perpetration of the alleged criminal act which caused it, as in cases of homicide the death must be shown, in larceny it must be proved that the goods were lost by the owner, and in arson that the house had been burned, for otherwise the accused might be convicted of murder when the person alleged to be murdered was alive, or of larceny

when the owner had not lost the goods, or of arson when the house was not burned. But when the general fact is proved the foundation is laid, and it is competent to show by any legal and sufficient evidence how and by whom the act was committed, and that it was done criminally."

The building described in the indictment is conceded to have been burned, and there were, we think, sufficient circumstances tending to show that it was of incendiary origin to justify the admission of the confessions of the defendant. The goods in the building belonged to his mother; they were overinsured; he remained in Lebanon over the Sunday before the fire, contrary to his usual custom; he was noticed to be "fidgety" and uneasy the day before the fire; and after the fire he told one witness that the stovepipe fell down; another, that after retiring he read and smoked for a time, and then laid his cigar on the table by his bed, and the next thing he knew he was awakened by smoke and flames; thus leaving the inference that the fire may have originated from the lighted cigar. The circumstances were competent as tending to show a criminal agency, and were for the determination of the jury.

* The remaining error is based on the action of the trial court in limiting the argument of counsel on either side to one hour. The time which may be occupied by counsel in the argument of a cause to the jury rests in the sound discretion of the trial court, and the appellate court will not interfere therewith unless there was an erroneous exercise of such discretion: *Hurst v. Burnside*, 12 Or. 520 (8 Pac. 888); 2 Enc. Pl. & Pr. 702; 12 Cyc. 568. The record before us does not disclose any abuse of discretion. It simply states that at the close of the testimony the court limited the time for argument to the jury to one hour on

* That part of the opinion between stars was reconsidered on a second hearing and the later opinion controls.

each side, to which ruling the defendant, by his counsel, then and there excepted. This is not enough. It is true that all the testimony is in the record, from which it would seem that an hour on each side was a very short time in which intelligently to present the case to the jury; but there may have been ample reasons why the trial court could not, under the circumstances then existing and the business before the court, permit a longer time.*

There are some other minor points in the case, but none of them are worthy of comment.

It follows from these views that there was no error in the record, and the judgment of the court below must be affirmed.

Decided 19 June, 1905.

ON REHEARING.

For appellant there was an oral argument by *Mr. Henry H. Hewitt* and *Mr. J. J. Whitney*.

For the State there was an oral argument by *Mr. Andrew M. Crawford*, Attorney General.

MR. JUSTICE BEAN delivered the opinion.

A rehearing in this case has been allowed and had. It is stoutly insisted that the court erred in holding: *First*, that the decision of the trial court as to the admissibility of the alleged confession of the accused is not to be disturbed on appeal unless for clear and manifest error; and, *second*, in affirming the action of that court in limiting in advance of the argument the time to be occupied by counsel to one hour on each side. We have examined both of these propositions with care, and adhere to the first, for the reasons stated, citing, as additional authority, however, *Holland v. State*, 39 Fla. 178 (22 South. 298).

3. But we are convinced that we should recede from the latter. The ground of our conviction is not one presented at the former hearing. The opinion was based on *Hurst v. Burnside*, 12 Or. 520 (8 Pac. 888), a civil case, and attention was not called to the fact that by limiting the argument the defendant had been deprived of a constitutional right, namely, that of being fully heard by counsel. It is declared in the Bill of Rights that, "in all criminal prosecutions, the accused shall have the right * * to be heard by himself and counsel": Section 11, Bill of Rights, Const. Or. (B. & C. Comp. p. 29). A similar guaranty is contained in the federal constitution: Sixth Amendment, U. S. Const. This means that the accused shall have the right to be fully and fairly heard, or else it means nothing. Anything less would be an invasion and restriction of the right guaranteed. "This right is of inestimable value," says the Supreme Court of Mississippi, in *Wingo v. State*, 62 Miss. 311, "not only to the accused, but to the administration of public justice. Under similar constitutional provisions, it may be regarded as settled law in American courts that any abridgment of this right which deprives the accused on trial of the time necessary to make his defense fully and fairly is an error, for which a new trial will be granted"; citing many authorities. To the same purpose is the expression of the court in *Yeldell v. State*, 100 Ala. 26 (14 South. 570, 46 Am. St. Rep. 20): "Courts are established for the administration and promotion of justice. If time and patience are not accorded a defendant, proceeded against in a cause in which his life or liberty is endangered, this high end and aim of the court would be subverted. If time is valuable and is pressing, if patience has been sorely taxed, any just judge will be careful, yet, to allow full and fair opportunity to counsel to present his client's defense. This much is guaranteed in the constitution, and no more." So, in

People v. Green, 99 Cal. 564, 567 (34 Pac. 231), the principle was stated as not to be questioned that the defendant has a constitutional right "to be fully heard in his defense by counsel, which it is not within the discretionary power of the court to deny or abridge." See, also, *People v. Keenan*, 13 Cal. 581; *Walker v. State*, 32 Tex. Cr. R. 175 (22 S. W. 685).

This guaranty vouchsafed to the defendant, however, is not inconsistent with the existence of the power in the court to regulate the exercise of the right of argument, so as to prevent an abuse thereof, by restricting it to a discussion of the matters relevant to the cause, and preventing counsel from wasting the time of the court by useless repetition. But, as said by the Supreme Court of California in *People v. Green*, 99 Cal. 564 (34 Pac. 231): "It must always be a difficult as well as a delicate matter, in a case like this, for the court to determine in advance what limitation should be imposed upon counsel against their consent"; for, as stated by Mr. Justice BLECKLEY, "How can the court know, in hours and minutes, how long the argument ought to be? There is no rule of practice that settles it by what he may suppose sufficient. As argument progresses, he may confine its range to the facts and law of the case, and may interdict idle repetition; but while counsel speak to the point, and proceed in good faith, wasting no time, how can the court forbear to be patient, and hear what is said? When it is manifest that the discussion is complete and the subject exhausted, a stop may be ordered": *Williams v. State*, 60 Ga. 367 (27 Am. Rep. 412). Some courts rest this matter of regulation upon the sound discretion of the trial court: *State v. Collins*, 70 N. C. 241 (16 Am. Rep. 771); *Williams v. Commonwealth*, 82 Ky. 640. But the better doctrine seems to be that the court may adopt suitable rules and limitations, and exercise such supervisory control over the course of the argu-

ment as may seem reasonably calculated to prevent the abuse of the right to be fully heard, and that otherwise it cannot exercise any discretion in the premises limiting or curtailing such right: *Lynch v. State*, 9 Ind. 541; *Word v. Commonwealth*, 3 Leigh, 743; *Jones v. Commonwealth*, 87 Va. 63 (12 S. E. 226); *White v. People*, 90 Ill. 117 (32 Am. Rep. 12).

4. Now, as shown by the record in this case, two counsel appeared for the accused. It required the greater part of three days to try the case. There were twenty-one or twenty-two witnesses examined, the testimony of whom, when transcribed and typewritten, filled a volume of 160 pages, and there were fifty-one exhibits introduced in evidence. Much of this testimony was circumstantial and conflicting, and the case was attended with many complications that required careful analysis on the part of counsel both for the State and for the defendant. Notwithstanding this, the court, at the close of the testimony, informed counsel that but one hour would be allowed on a side for the argument of the case. To this ruling defendant's counsel excepted at the time, and one of them then and there declined to address the jury, on the ground that the time limited was too short. The other spoke for about three quarters of an hour. Considering the whole case and the character of the testimony, we are clear that the limitation of an hour was too restrictive to permit a full and fair discussion of the case before the jury, and a violation of defendant's constitutional rights. The foregoing authorities afford ample illustration, and fully sustain this conclusion.

It follows that the affirmance must be vacated and the judgment reversed, and a new trial ordered.

REVERSED.

Argued 1 November; decided 12 December, 1904; rehearing denied.

WOLLENBERG v. ROSE.

[78 Pac. 751.]

VENDOR AND PURCHASER — DEATH OF PARTNER — CONVEYANCE REQUIRED TO COMPLY WITH CONTRACT TO SELL.

1. Where a firm contracted to convey real estate and both members of the firm died before completion of the contract, the vendee was entitled to a deed from the heirs of the deceased members of the firm, and was not obliged to accept a deed from any one else, as such a conveyance would not be a compliance with the contract.

VENDOR AND PURCHASER — MARKETABLE TITLE — PENDING SUITS.*

2. A vendee who has contracted for the purchase of real property is ordinarily entitled to a marketable title, and one subject to suits to set aside some of the deeds conveying the land to the vendor is not marketable.

MARKETABLE TITLE — PARTIES NOT BEFORE THE COURT.

3. Upon considering whether a title is marketable a court cannot determine the rights of parties not represented, and declare the title marketable as against them.

TITLE SUBJECT TO LITIGATION NOT MARKETABLE.

4. A title that on the face of the record may have to be quieted by a decree is not marketable.

From Douglas: JAMES W. HAMILTON, Judge.

Suit by H. Wollenberg, as administrator of the partnership estate of S. Marks & Co., against J. F. Rose to compel specific performance of a contract to buy certain land. On a former appeal it was decreed that plaintiff was under obligation to give to defendant a good and sufficient deed such as will convey the legal title: 41 Or. 314, 318 (68 Pac. 804). Plaintiff then tendered a title, which was refused. From a decree for plaintiff this appeal is taken.

REVERSED.

For appellant there was an oral argument by *Mr. Commodore S. Jackson*, with a brief to this effect.

I. A "good and sufficient title" cannot be passed to a decedent's real property by those who are not the heirs of decedent, or those who are strangers to the original

* NOTE.— See 96 Am. St. Rep. 545 for collection of authorities on what constitutes a marketable title, and whether equity will compel the acceptance of an uncertain title. See, also, 3 L. R. A. 739 on same subject. REPORTER.

contract sought to be specifically enforced: *Wollenberg v. Rose*, 41 Or. 314, 318 (68 Pac. 804); *Taylor v. Porter*, 1 Dana, 421 (25 Am. Dec. 155); *Ross v. Grimbball*, Charl. 268 (4 Am. Dec. 712); *People v. Open Board of Stockbrokers*, 92 N. Y. 98, 104; *Barbour v. Hickey*, 2 App. D. C. (24 L. R. A. 763).

II. The grantee in a contract of sale of real property is not required in a suit for a specific performance to accept a doubtful or litigated title, or a title which is not merchantable: Fry, Spec. Perf. (3 Am. ed.) § 862; *Morgan's Heirs v. Morgan*, 15 U. S. (2 Wheat.) 290; *Watts v. Waddle*, 31 U. S. (6 Pet.) 389; *Wilson v. Toppan*, 6 Ohio, 172; *Ludlow v. O'Neil*, 29 Ohio St. 182; *Richmond v. Gray*, 3 Allen, 27; *Stuyvesant v. Jacques*, 14 Allen, 523; *Jeffries v. Jeffries*, 117 Mass. 184; *Cunningham v. Blake*, 121 Mass. 333; *Butts v. Andrews*, 136 Mass. 221; *Chesman v. Cummings*, 142 Mass. 65 (7 N. E. 13); *Vreeland v. Blauvelt*, 23 N. J. Eq. 483; *Tillotson v. Gesner*, 33 N. J. Eq. 313; *Cornell v. Andrews*, 35 N. J. Eq. 7; *Cornell v. Andrus*, 36 N. J. Eq. 321; *Powell v. Conant*, 33 Mich. 396; *Swayne v. Lyon*, 67 Pa. St. 436-439; *Hymers v. Branch*, 6 Mo. App. 511; *Gill v. Wells*, 59 Md. 492; *Griffin v. Cunningham*, 19 Gratt. 571; *People v. Open Board of Stockbrokers*, 28 Hun, 274; *Lohier v. Williams*, 1 Curt. (C. C.) 479; *Pyrke v. Waddingham*, 10 Hare, 1; *Stapylton v. Scott*, 13 Ves. Jr. 425; *Wilcox v. Bellaers*, 11 Eng. Ch. 266; *Hartley v. Smith*, Buck, 368; *Jervoice v. Duke of Northumberland*, 1 Jac. & W. 559.

He will not be forced to purchase a lawsuit: *Watterman*, Spec. Perf. 412; *Earl v. Campbell*, 14 How. Pr. 330; *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Linn v. McLean*, 80 Ala. 367.

The burden of proof to show that he can convey a "good and sufficient" title rests upon the plaintiff: *Hull v. Glover*, 126 Ill. 122 (18 N. E. 198).

It is sufficient to defeat the suit when it is shown that the title which complainant is prepared to give is doubtful: *Close v. Stuyvesant*, 132 Ill. 607 (3 L. R. A. 161, 24 N. E. 868).

The purchaser may withdraw his deposit and terminate his contract where it calls for a good and sufficient title, and such is not furnished: *Turner v. McDonald*, 76 Cal. 177 (9 Am. St. Rep. 189, 18 Pac. 262).

III. A deed executed by persons who are not parties to the original contract made with the grantee, and which would subject the grantee to litigation, and conveys but a mere naked title, is not a "good and sufficient" deed of conveyance to real estate: *Ross v. Grimbail*, Charlt. 268 (4 Am. Dec. 712); *Turner v. McDonald*, 76 Cal. 177 (9 Am. St. Rep. 189, 18 Pac. 262); *Townshend v. Goodfellow*, 40 Minn. 312 (12 Am. St. Rep. 736, 3 L. R. A. 739, 41 N. W. 1050); *Barbour v. Hickey*, 2 App. D. C. 207 (24 L. R. A. 763 and note); *Hull v. Glover*, 126 Ill. 122 (18 N. E. 198); *Rede v. Oakes*, 4 De Gex J. & S. 505; *Vreeland v. Blauvelt*, 23 N. J. Eq. 483; *Shriever v. Shriever*, 86 N. Y. 575, 585; *Conley v. Finn*, 171 Mass. 70 (68 Am. St. Rep. 401, 50 N. E. 460).

For respondent there was an oral argument by *Mr. F. W. Benson*, and *Mr. J. C. Fullerton*, with a brief to this effect.

It would seem that the proposition we seek to maintain is elementary law and needs no authorities in its support. The proposition is simply, that under a contract for the sale of real property, where the vendor complies with his contract and demands a deed, he cannot refuse to accept the deed tendered because not made by the party with whom he made the contract, if it is made by the person who holds the legal title to the land at the time the same is tendered: *Pomeroy*, Contracts, § 465 (2 ed.); *Boyd v. Bunckton*, 55 Cal. 427-430.

MR. JUSTICE WOLVERTON delivered the opinion.

On October 1, 1892, S. Marks and A. Marks were doing business under the firm name of S. Marks & Co., at which time they entered into a verbal contract with the defendant Rose to convey to him certain real property for the consideration of \$1,500, see this case on former appeal, 41 Or. 314 (68 Pac. 804). Rose paid part of the purchase price, and, failing to pay the balance, the plaintiff, by way of cross-bill to an action by defendant to recover from plaintiff the amount of the purchase money paid, seeks to recover from defendant such balance, and in order to do that, it was necessary to show that the plaintiff was ready, able, and willing to perform the contract of S. Marks & Co. to convey a good title to the premises. Both members of the firm of S. Marks & Co. died subsequently to entering into the contract—S. Marks, intestate, leaving several heirs, and A. Marks, testate, leaving his property, except some minor bequests, to Hermann Marks. The heirs of S. Marks have also executed and delivered to Hermann Marks deeds to their interests in the premises herein involved, so that, according to the record, Hermann Marks appears to be the sole owner of the entire legal title. When the case was here before, we said, in answer to an objection to the complaint, that the heirs of S. Marks & Co. were not made parties, that “the administrator declares his readiness and ability to make a good and sufficient deed to convey the title upon payment of the demand, which is sufficient, after answer, we think, to overcome the objection. The deed, we take it, should come from the heirs, to carry a good title. The administrator, as such, could not make it, or any deed to realty, without adequate authority from a competent court. A conveyance, however, from the lawful heirs of S. Marks & Co., would satisfy the demand, and if the administrator furnishes it, there

can be no cause for complaint." On a remand of the case, the plaintiff tendered his deed as administrator *de bonis non* of the estate of S. Marks & Co., together with a deed, regular in form, from Hermann Marks, the owner of the legal title, and demanded the balance of the purchase price, which was tendered at the same time by Rose. Rose, however, refused to accept the deeds or to pay the money for the reasons (1) that the deeds were not from the heirs of the deceased members of the partnership; and (2) that the deed from Hermann Marks would not convey a good title, free from dispute, because some of the heirs of S. Marks were seeking to set aside their conveyances to Hermann for fraud perpetrated by him in procuring them.

1. We are satisfied that the tender of the Hermann Marks deed was insufficient, in so far as it purported to convey the interests of the heirs of S. Marks. The undertaking to convey is usually in behalf of the vendor, his heirs, executors, and administrators, and, whether expressed or not, such would probably be its legal effect, so that a performance on the part of the heirs or legatees or personal representatives, when the latter are duly authorized thereto, would be tantamount to a fulfillment of the obligation on the part of the vendor. But a third party, a stranger to the undertaking, could not discharge the obligation, though in a position to convey a good and sufficient title, for the very good reason that the vendee has not contracted for his deed, but for that of the vendor, or, in case of his death, that of his heirs, legatees, or personal representatives. "The appellee," says Mr. Justice UNDERWOOD, in *Taylor v. Porter*, 1 Dana, 421 (25 Am. Dec. 155), "is not bound to accept the title from any one except his vendor or his representatives, acting in their representative character. The insolvency of McGinnis, in this case, cannot change the rule. Taylor's warranty may be better

than that of the representatives of McGinnis, but Porter is not bound to accept it, because he made no contract with Taylor." In this case McGinnis bound himself to convey to Porter, but, he not having the title, it was sought to require Porter to accept title from Taylor, with the result, as above indicated, that the court refused the relief. *Seaver v. Hall*, 50 Neb. 878 (70 N. W. 373), is illustrative. Before plaintiff could have put the defendant in default, he must have tendered performance of the contract (*Soper v. Gabe*, 55 Kan. 646, 41 Pac. 969); and, not having done so, he cannot insist upon the payment of the balance of the purchase price demanded.

2. The second reason assigned for refusing the tendered deed is also potent and sufficient. The evidence shows that litigation is actually pending between some of the heirs of S. Marks and Hermann Marks, whereby it is sought to set aside their deeds to Hermann on account of fraud; and there is some evidence that it is being prosecuted in good faith, there being none to the contrary. Plaintiffs in these cases have stated good causes for relief, which tend palpably to discredit the title which plaintiff tenders by the deed of Hermann Marks. This, with the evidence of good faith in the prosecution, affords a sufficient reason, *prima facie*, at least, for refusing to accept the deeds. Generally it is sufficient upon which to base such refusal if there be doubt and uncertainty about the title sufficient to form the basis for litigation, for, if there be doubt, it cannot be thrown upon the purchaser to contest that doubt (*Rede v. Oakes*, 4 De Gex, J. & S. 505), and a reasonable doubt on this head will prevent the vendor's obtaining his remedy. The title tendered must be a good, clear, marketable title (Pomeroy, Spec. Perf. § 342); and, to be good, it seems to have been admitted in *Turner v. McDonald*, 76 Cal. 177 (18 Pac. 262, 9 Am. St. Rep. 189), that it "should be free from litigation, palpable defects, and

grave doubts, should consist of both legal and equitable title, and should be fairly deducible from the records." See, also, *Conley v. Finn*, 171 Mass. 70 (50 N. E. 460, 68 Am. St. Rep. 399), and *Dobbs v. Norcross*, 24 N. J. Eq. 327. The doubt ought not, of course, to be a mere captious one, but must be considerable and rational—such as would and ought to induce a prudent man to hesitate to take the title if he was effecting an original purchase. A mere possibility of a defect or a threat or the possibility of a contest will not be enough: *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400; *Gill v. Wells*, 59 Md. 492. If the title depends on the record, and all the muniments are in evidence, so that the defects may appear from an inspection, it is then purely a question of law for the court to determine and settle by construction; but, if it depends upon matters of fact to be established by parol, then the cause must be made very clear by the vendor to warrant a court in ordering specific performance: *Townshend v. Goodfellow*, 40 Minn. 312 (41 N. W. 1056, 3 L. R. A. 739, 12 Am. St. Rep. 736). The case here is not the tender of a title dependent upon matters of fact, but of one that is assailed for fraud in its procurement. The question to be determined as to the fraud, however, is one of fact; and, the appellant having brought such a record of actual suits pending and a showing of good faith in their prosecution as to cause a prudent man of business sagacity to hesitate to accept the title, it would be an act of injustice to compel him to take it with the burden of defending against the attacks. Enough has been shown, it seems to us, to require the plaintiff to prove that the title tendered is free from any peril of the impending litigation, and that it was only instituted for the purpose of annoying and harassing him, without inherent merit.

3. But even if such proof had been made, there is a serious difficulty in the way of our settling the title so as

to make it marketable, or such as the defendant ought to be required to accept. It is said in *Fleming v. Burnham*, 100 N. Y. 1, 10 (2 N. E. 905), that a court cannot make a title marketable "by passing upon an objection depending on a disputed question of fact, or a doubtful question of law, in the absence of the party in whom the outstanding right was vested." See, also, *Irving v. Campbell*, 121 N. Y. 353 (24 N. E. 821, 8 L. R. A. 620). So, again, it is said in *Schultz v. Rose*, 65 How. Prac. 75, that a decision of a court in a suit for specific performance "can heal no inherent weakness or restore a broken link in the chain of title, unless the facts and parties essential and affected are before it, and in a relation and condition to be dealt with." Such is the condition of the case here. If these heirs were all before us, and a full investigation had been gone into respecting the pending litigation, the court would be in a position to pass on the title tendered, and determine its merits so as to bind them; but it cannot bind them in their absence, or pass the title thus seriously questioned and assailed. If the deeds of these heirs had been tendered without objection from them, the fact that they were not made parties would not have impaired the plaintiff's right of recovery; and such was the hypothesis upon which the former opinion in this case was rendered, but a very different case has since been developed.

4. It is urged, however, that this controversy has arisen since the contract to convey was entered into, and that the heirs would take with notice and subject to the equities of the parties, and that defendant would obtain a title that he could successfully defend against them. But this does not meet the objection. It still puts the defendant to the burden of litigating with these heirs, and renders the title unmarketable in the mean while—such as prudent persons dealing in realty would not choose to accept. So that in either case the plaintiff has not tendered such a

title as the defendant was required to accept before paying the balance of the purchase price.

The decree of the circuit court will therefore be reversed, and one here entered dismissing the plaintiff's cross-bill.

REVERSED.

Decided 15 August, 1904; rehearing denied 30 April, 1905.

DEVINE v. BILLINGSLEY.

[77 Pac. 958.]

From Harney: MORTON D. CLIFFORD, Judge.

This is a suit to establish a trust in land. J. D. Billingsley having commenced an action against the Pacific Livestock Company, a corporation, to recover possession of section 2, and the southeast quarter of section 3, in township 34 south of range 34 east, in Harney County, the latter pleaded that it was in possession thereof as a tenant of Jennie Devine, plaintiff herein, who, on application therefor, was substituted as a party defendant, and, having filed an answer therein, alleging that she had no defense at law, but was entitled to relief arising out of facts material to her defense, and requiring the interposition of a court of equity, thereupon, as plaintiff, filed a complaint in the nature of a cross-bill, averring, in substance, that in 1891, and prior thereto, John S. Devine, her husband, purchased and paid the full consideration for certain real property, including the premises hereinbefore described, causing the deeds therefor to be executed to the defendant, to secure the payment of a debt due him; that her husband died intestate September 13, 1901, leaving her his sole heir, and, his estate having been duly administered, the real property involved herein was distributed to her; and that the debt due from her husband to the defendant has been fully paid, but he refuses to

reconvey the premises to her. The answer denied the material allegations of the complaint, and averred that defendant, complying with the provisions of the statutes of the United States, secured the legal title to 960 acres of land, which he conveyed to one Henry Miller, at the request of and upon agreement with Devine that he should receive in exchange therefor lands of equal value; that, in pursuance of such contract, and in payment for services rendered by the defendant for Devine, it was stipulated, on a settlement of their business, that the 800 acres sought to be recovered in the action of ejectment should belong to him, and also agreed that in consideration of the improvement of the premises, and of the payment of the taxes thereon by Devine, he was to have possession thereof, which he held at the time of his death. The reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a decree enjoining further prosecution of the law action, declaring that defendant held the legal title to the land in controversy in trust for the plaintiff, and requiring him to execute to her a deed thereof, and he appeals. The case was submitted on briefs under the proviso of Rule 16 of the Supreme Court: 35 Or. 587, 600. AFFIRMED.

For appellant there was a brief over the names of *Thorn-ton Williams* and *Lionel R. Webster*.

For respondent there was a brief over the name of *John Langdon Rand*.

MR. CHIEF JUSTICE MOORE, after stating the facts in the preceding terms, delivered the opinion of the court.

The transcript shows that in 1891, and prior thereto, J. S. Devine purchased nearly 15,000 acres of land in Harney County, Oregon, causing the deeds therefor to be executed to the defendant, to whom he was indebted in the

sum of \$3,549, evidenced by a promissory note given May 1, 1890. Devine on January 7, 1893, borrowed from one E. P. McCornack a large sum of money, giving as security therefor a deed executed by the defendant for all the lands so conveyed to him, except section 2 and the southeast quarter of section 3 in township 34 south of range 34 east of the Willamette Meridian. The promissory note mentioned was fully paid, but just prior to Devine's death he again became indebted to the defendant in the sum of \$836, which was thereafter discharged by plaintiff. McCornack, as plaintiff's witness, testified that soon after Devine's death he went to Harney County and met the defendant, who, in referring to the property which was supposed to belong to the decedent's estate, informed him that he held a section of land and certain cattle; saying that he helped to buy the latter, which had been assessed to him, and that the title thereto stood in his name. The witness having informed him that he furnished Devine more than \$10,000 with which to buy cattle, inquired by what right he held the title to the land so claimed, to which he replied: "Well, you know that Devine has used my name very freely, and I have done a great deal for him, and I think I ought to have this land. I admit there was no financial consideration, but I have done enough to earn that land, and John [meaning Devine] intended I should have it. He always referred to it as my ranch, and when I was there he would say: 'Jeff, there is your ranch. How does it look'? And in conversation he always spoke to me as though it was my ranch, and I feel that I am entitled to it, and I am going to keep it." The witness further said that defendant told him Devine had used his name to such an extent that at one time he became so frightened that he conveyed all his own property to his wife. The transcript also shows that the defendant, under

various acts of Congress, secured from the United States patents for the south half of the southwest quarter of section 12, the northwest quarter, the south half of the northeast quarter, and the south half of section 13 in township 33 south of range 34 east, the northwest quarter of section 11 in township 31 south of range 35 east, and the northwest quarter of section 29 in township 30 south of range 36 east of the Willamette Meridian, containing 960 acres. Devine on December 19, 1890, entered into a contract with one Henry Miller whereby he agreed to convey, *inter alia*, the premises so patented to the defendant, who, on February 26, 1891, executed a deed therefor to Miller, receiving March 3d of that year from the latter and from other persons a deed for the 800 acres in question and for other lands.

The defendant, as a witness in his own behalf, denies that he told McCornack that he claimed the cattle which belong to Devine's estate, though they were assessed to him; that he did not say there was no "financial consideration" for the land which he claimed—testifying on that branch of the subject as follows: "That 'financial,' that is a word—I seldom ever use a word like that; that 'consideration'—I might have said 'there was no money consideration'; there wasn't any money taken." The defendant, in answer to the following question asked by his counsel: "Do you remember the conversation that you had with McCornack at that time in relation to the 800 acres of land?"—replied: "Well, I—We had some conversation about it. I told him that I owned the land—owned 800 acres of land. I don't know whether I said 'eight hundred acres' or not. I might have said 'section' or 'about a section,' or might have referred to it in them words; but I didn't, when talking to Mr. McCornack—I don't think there was ever anything come up like this. I don't remember everything that was said at all. I wasn't keeping everything down, or trying to. I was just

talking in a general way, like two men interested in the same thing would in a conversation." The defendant further says that the note for \$3,549 was given for money loaned to Devine in pursuance of an agreement entered into in 1886 that it was to be used in buying land, the title to which was to be taken in his name, whereby he was to secure an undivided interest in the premises purchased therewith, and that he never sold Devine any part of the 960 acres for which he secured patents, or received any payment therefor, except the right to retain the 800 acres set apart to him, but that he conveyed his homestead, preemption, and desert claims to Miller at Devine's request, and to aid the latter in securing a valuable stock ranch. The defendant, answering the inquiry of his counsel in relation to the circumstances under which his deed to McCornack was executed, said: "Well, Mr. Devine wanted to get some money from Mr. McCornack— He wanted to get some money to stock his ranch up, and he said that he would mortgage the whole works; mortgage all of it. And I told Mr. Devine that, if I had any interest in the land, I would like to have it set aside, and that he could take his and do what he pleased with it. So he took his part, and I deeded it to Mr. McCornack. I thought it was a straight-up sale at the time. And what was left—this 800 acres—was left to me to pay me for my homestead, preemption, and desert claims." The defendant's wife, as his witness, testified that, after joining in executing a deed at Devine's request, he remarked to her husband: "Well, Jeff, what of this land is left is yours. This land is left is yours. Now all of it belongs to you." The plaintiff, as a witness in her own behalf, testified that in 1892, while returning from Ontario, Oregon, the defendant, calling her attention to the premises preëmpted by him, said: "There is a piece of land that I sold to John" (meaning Devine), and, in speaking of the transaction, further re-

marked, "All the rest of the boys got a horse, but I didn't get any," and that she said to him, "'I will speak to Mr. Devine about that,' and I did, and he got the horse." C. E. Kenyon, formerly county clerk of Harney County, and, at the time of the trial herein, engaged as a merchant at Burns, testified, as plaintiff's witness, that the day her husband died the defendant, referring to the deceased, said: "Mr. Devine was the best friend I ever had. He gave me the best part of the Alvard Ranch"—meaning the 800 acres in question.

The testimony given by the witnesses for the respective parties is contradicted in nearly every particular that is at all material, but, considering the attendant circumstances, we think the preponderance is with the plaintiff. It will be remembered that the land in controversy was conveyed to the defendant by Miller in March, 1891; that McCornack's deed was given in January, 1893; and that Devine died in September, 1901. McCornack testified that, when his deed was executed, Devine told him that the 800 acres in question, and also the northeast quarter of section 3 in township 34 south of range 34 east, constituting his homestead, must not be included, as the security given was ample, and that, referring to the land so exempted, he further said: "That is my heart's blood. That little ranch is my heart's blood, and I am going to keep it." The testimony discloses that in 1891 the land now claimed by the defendant was valued at about \$5 an acre, but in the ten years following Devine improved the premises to such an extent that the 800 acres is reasonably worth \$20,000; that he had the willows and sagebrush grubbed up, and an expensive canal constructed to conduct water from a creek to the premises which he cultivated, growing alfalfa thereon; that, though a fence surrounded the 800 acres when purchased, he subdivided the tract by partition fences, made about 60 acres into an

elk park, built several houses and a large barn, and paid all the taxes imposed thereon; and that the defendant during Devine's life was never known to assert any claim to the land. The defendant's testimony to the effect that Devine was to have the use of the land in consideration of the improvements which he might make thereon is, in our opinion, overthrown, when their kind and extent are considered. We also believe Mrs. Devine's testimony that the defendant informed her that he had sold to her husband the land which he had preëmpted. She seems to be corroborated in this particular by McCornack, who said the defendant at first admitted that no "financial consideration" existed for the land which he now claims, and by Kenyon, who said that the defendant told him that Devine gave him the best part of Alvard Ranch.

We believe a careful examination of the testimony and a consideration of the surrounding circumstances warrant the conclusion that the defendant holds the legal title to the 800 acres in trust for Devine's heirs; that he sold all the lands patented to him to Devine, though he did not execute a deed therefor until he conveyed the premises to Miller; that he received from Devine a horse as extra compensation for his preëmption claim, but retained the title to the 960 acres of land, probably on the assumption that, if he could be trusted to hold other lands, he would execute a deed for those patented to him when requested to do so; and that, the notes secured by the real property conveyed to him having been fully paid, no error was committed in requiring him to convey the 800 acres in question to Mrs. Devine, as the sole heir of her husband; and hence the decree is affirmed.

AFFIRMED.

Argued 18 October, decided 31 October, 1904.

ALLESINA v. ORIENT INSURANCE CO.

ALLESINA v. WESTCHESTER INSURANCE CO.

ALLESINA v. ATLAS INSURANCE CO.

[78 Pac. 1117.]

From Multnomah: ARTHUR L. FRAZER, Judge.

These were actions by John Allesina against the above named insurance companies on sundry fire insurance policies, resulting in judgments for plaintiff, from which these appeals are taken.

For appellant there was a brief over the names of *Teal & Minor* and *T. C. Van Ness*.

For respondent there was a brief and an oral argument by *Mr. Henry E. McGinn*.

PER CURIAM. The above entitled causes were submitted on the argument of the case of *Allesina v. London & Liverpool & Globe Insurance Company*, 45 Or. 441 (78 Pac. 392), and are controlled by the opinion rendered in that case. The judgments are therefore affirmed. AFFIRMED.

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2. In a prosecution for adultery evidence that the female participant had an evil reputation for unchastity is admissible against the man.

State v. Eggleston, 346.

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3. On a prosecution for adultery, evidence that defendant and the female participant had previously committed adultery at other times and places than the time and place charged in the information is admissible as tending to show the social relationship of the parties at the time stated in the charge.

State v. Eggleston, 346.

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4. Evidence of an adulterous or amorous disposition on the part of defendant in a prosecution for adultery and of the other participant is a circumstance proper for the consideration of the jury, whether before or after the date charged, even though it may amount to proof of another offense. *State v. Eggleston*, 346.

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6. Under Section 1309, B. & C. Comp., the exact time of the commission of an offense need not be precisely stated, as in adultery, for example, unless time is a material element in the case, and the jury may with propriety be told that proof as to time is sufficient if it shows the offense to have been committed within "a month or more" of the date charged. *State v. Eggleston*, 346.

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alleged injury, the owner of sheep that trespass on unfenced land in the specified counties is liable for the injury so caused, the common law being there in force.

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1. An order of the trial court granting or overruling a motion for a new trial is not a final order from which an appeal may be taken.

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2. An order overruling a motion for judgment of dismissal based on the pleadings, the evidence and the stipulations of fact is not an order from which an appeal may be taken, since it requires the makings of findings, and is not final.

Scott v. Ford, 581.

IDEM — REGULARITY OF APPEAL TO CIRCUIT COURT.

3. The question of plaintiff's right to appeal to the circuit court from a justice's judgment is one for the circuit court to pass upon in the first instance, and its decision may be reviewed on appeal in a proper case, but the validity of that appeal cannot be raised on a motion to dismiss the appeal from the judgment of the circuit court.

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4. Under Section 548 of B. & C. Comp., which provides that any party to a final order may appeal therefrom to the supreme court, either party to a judgment in a forcible entry and detainer action in the circuit court may appeal therefrom.

Dechenbach v. Rima, 500.

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5. An order settling the items of a disputed cost bill is not the final order in the case, from the date of which the time to appeal is computed.

Lemmons v. Huber, 282; *Wadhams v. Allen*, 485.

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6. An order determining the action on its merits and giving judgment is a final order in the case, and upon its entry the time for appealing begins to run. The taxing of the costs is a subsequent matter the determination of which does not affect the "judgment" in the case.

Lemmons v. Huber, 282; *Wadhams v. Allen*, 485.

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7. Under Section 72, B. & C. Comp., providing that the objection of want of jurisdiction in the court is not waived by failure to demur or answer on that ground, the question may be first suggested on appeal.

Kalyton v. Kalyton, 116.

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8. An objection of want of parties cannot be first urged in the appellate court, it is waived unless presented to the trial court.

Thompson v. Hibbs, 141.

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9. In view of Section 38, B. & C. Comp., providing that no action shall abate by the death or disability of a party, or by transfer of any interest, if the cause of action survive or continue, and that, in case of death or other disability, the court may within a year allow the action to be continued by or against the personal representatives or successor in interest, a change of the interest of a party after judgment does not affect a pending appeal, and no substitution is necessary.

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10. Under the terms of B. & C. Comp. § 549, Subds. 1 and 2, providing for the giving and filing of a notice of appeal and an undertaking, the serving and filing

of the notice is the necessary jurisdictional step, without which the appellate court cannot proceed. *Dowell v. Bolt*, 89.

IDEM — TIME FOR GIVING NOTICE.

11. An appeal from the final order in a case must be taken within the time limited after the date of that order and not from the date of some subsequent order, as, for example, the order settling the costs.

Lemmons v. Huber, 282; *Wadhams v. Allen*, 485.

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12. Where a party is unintentionally in default in the performance of any act necessary to perfect an appeal to the supreme court initiated in good faith, except the serving and filing of the notice of appeal, the appellate tribunal may, in its discretion, permit the subsequent performance of such act, under the terms of B. & C. Comp. § 549, subd. 4, regardless of whether the omission was due to a mistake of law or of fact. *Dowell v. Bolt*, 89.

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13. Alleged errors cannot be considered unless the facts in relation thereto appear in the bill of exceptions.

Oliver v. Oregon Sugar Co. 77; *State v. Eggleston*, 346.

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14. An objection to a deposition because it was not taken in accordance with the stipulation of the parties is not available on appeal unless the points of difference appear in the record. *Oliver v. Oregon Sugar Co.* 77.

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15. Where defendant was tried and convicted of a violation of Laws 1901, p. 27, § 1, making it unlawful for one not a registered barber to conduct a barber school without the permission of the board of barber examiners, and a motion in arrest of judgment was sustained on the theory that the law was unconstitutional, only the question of the validity of the law, and not the conduct of the board of examiners under it, was presented for consideration on appeal. *State v. Briggs*, 366.

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16. In the absence of a bill of exceptions the appellate court can consider only whether the findings support the judgment. *Miller v. Head Camp*, 192.

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17. A delay of three days in filing a brief, though unexplained, will not require an affirmance for failure to comply with the rule of court, where the appeal is evidently prosecuted in good faith. *Wood v. Fisk*, 276.

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18. Though an appeal should be dismissed when the cause of controversy has ceased to exist, such a disposition should not be made of a case where the only result of the change is to perhaps render the judgment or decree fruitless. If the dispute still exists, it should be determined. *Livesley v. Johnston*, 30.

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19. In a suit to require specific performance of a contract to sell chattels where an interlocutory injunction restraining the defendant from disposing of the property was dissolved upon a decree being entered against the plaintiff, the appeal should not be dismissed because the defendant thereafter sold the property and it was removed from the state. The plaintiff's right to a decision on the merits of his claim cannot be destroyed by the act of defendant. *Livesley v. Johnston*, 30.

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20. A party will not be permitted to object to an instruction that he has himself suggested. *Anderson v. Oregon Railroad Co.* 211.

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21. Where it appears merely that an objection was offered and overruled there is a presumption that it was made at the trial, though the objection is one that might have been made by a preliminary motion. *Oliver v. Oregon Sugar Co.* 77.

IDEM — THAT RULINGS AT TRIAL WERE CORRECT.

22. Where, in an action for personal injuries, defendant's motion for a new trial was based on a claim of excessive damages, appearing to have been given under the influence of passion and prejudice, and also upon the insufficiency of the evidence to justify the verdict, it must be presumed on appeal that an order requiring a remittitur of part of the damages assessed as a condition of denying the motion for a new trial was entered partly because of the insufficiency of the evidence, and not because the verdict was the result of passion or prejudice. *Adcock v. Oregon Railroad Co.* 178.

IDEM — THAT EVIDENCE JUSTIFIED THE VERDICT.

23. Where the trial court was not requested to instruct the jury to return a specified verdict by reason of any failure of proof, it will be presumed on appeal that the evidence was sufficient. *State v. Eggleston*, 346.

IDEM — THAT PUBLIC BOARD ACTED PROPERLY.

24. In a case involving the legality of a law creating a board with power to adopt rules, it will be presumed on appeal, in the absence of a showing in the record that the board acted within its powers. *State v. Briggs*, 366.

IDEM — AS TO EFFECT OF ERROR.

25. Error is presumptively prejudicial and is cause for reversal unless the record affirmatively shows that it was harmless. *Carter v. Wakeman*, 427.

HARMLESS ERROR — EVIDENCE AS TO UNDISPUTED CLAIM.

26. Evidence merely tending to support an allegation admitted by the pleadings, while not proper, is harmless. *Oliver v. Oregon Sugar Co.* 77.

IDEM — PHOTOGRAPHS AS EVIDENCE.

27. In an action for the death of a child from the fall of timbers alleged to have been negligently piled in the street, any error in the admission in evidence of photographs of the premises, taken the day following the accident, showing the premises as they were before the accident, with the exception of the timbers, was harmless. *Macdonald v. O'Reilly*, 589.

IDEM — MISCOMPUTATION OF INTEREST.

28. Where the verdict rendered was below the amount actually due on the basis of 6 per cent interest, an instruction permitting the allowance of 8 per cent on a part of the debt which had accrued prior to the enactment of Laws 1898, p. 15, reducing the rate to 6 per cent, if error, was harmless. *Thompson v. Purdy*, 197.

CURING ERROR BY INSTRUCTION.

29. Error in admitting testimony which the court subsequently concludes was incompetent is cured by a statement withdrawing such testimony and an instruction at the close of the case to disregard it. *State v. Eggleston*, 346.

IDEM.

30. Improper remarks of counsel during a trial, promptly disapproved by the judge, and not afterward continued, do not constitute reversible error, it appearing quite certainly that no prejudice resulted. *Thompson v. Purdy*, 197.

INSTRUCTIONS ON ABSTRACT PROPOSITIONS.

31. When there is no evidence of certain facts, an instruction that if the jury find such facts to exist they may draw certain inferences therefrom is abstract and misleading, constituting reversible error. *Anderson v. Oregon Railroad Co.* 211.

SPECIAL INSTRUCTIONS MUST BE REQUESTED.

32. Error is not assignable for failure of the trial court to charge that the jury must find the crime to have been committed in the county as laid, unless a request to that effect was proffered. *State v. Eggleston*, 346.

DISPOSITION OF CAUSE—BILL OF REVIEW TO CORRECT DECREE.

33. Where it is claimed that the enforcement of a judgment or decree will be inequitable, owing to occurrences since its rendition, or the discovery of testimony that would probably have produced a different result in the case, and reasonable diligence has been used, the remedy is not by a motion to recall or modify the mandate, but is by an original suit of impeachment in the nature of a bill of review. *McLeod v. Lloyd*, 67.

IDEM—OPPORTUNITY TO AVOID INJUSTICE.

34. When the pleadings are ambiguous, and do not clearly define the rights insisted upon, and one of the parties has been misled to his prejudice by failing to offer testimony, a decree will be vacated to give an opportunity for the introduction of further testimony. *McPhee v. Kelsey*, 290.

IDEM—SATISFYING JUDGMENT.

35. Before a satisfaction of a judgment can operate as an abandonment of an appeal it must clearly appear that the compliance with the final order was voluntary. *Culver v. Randle*, 491.

EQUITY DECREE ON APPEAL—RES JUDICATA.

36. Under B. & C. Comp. § 406, providing that, on an appeal from a decree in equity, the case shall be tried *de novo* and a final decree entered by the appellate court, without reference to the findings of fact or conclusions of law of the trial court, the rights of the parties and the questions adjudicated must in subsequent litigation be ascertained from the decree on appeal, and not from that of the court below. *Gentry v. Pacific Livestock Co.* 233.

EQUITY CASES ON APPEAL—VALUE OF FINDINGS AND CONCLUSIONS.

37. In equity under the Oregon practice as prescribed by Sections 406 and 555, B. & C. Comp., a suit is tried anew on appeal on the transcript and evidence, without reference to the findings or conclusions of the trial court, the appeal being from the decree. *Gentry v. Pacific Livestock Co.* 233.

FINDINGS BY SUPREME COURT IN LAW ACTIONS.

38. Where different inferences may be drawn from the evidence, the supreme court cannot make findings of fact on appeal in a law action, nor substitute one finding for another. *Scott v. Ford*, 531.

RIGHT OF SUPREME COURT TO ENTER JUDGMENT ON FINDINGS.

39. Where the findings of fact by the trial court in a law action will not support a judgment for either party, the only course left for the supreme court is to send the case back. *Scott v. Ford*, 531.

MAKING FINDINGS ON CONFLICTING EVIDENCE.

40. Where the evidence in the record on appeal in a law action is such that different inferences and deductions may reasonably be drawn therefrom, the supreme court cannot revise the findings or make new ones. *Scott v. Ford*, 531.

CONSTRUCTION OF CONFUSED CONCLUSION.

41. A conclusion of law that "the sum so paid to defendant as a legatee under the will * * was erroneously paid," is a conclusion of law and not a finding of fact. *Scott v. Ford*, 531.

ARGUMENT OF COUNSEL.

Constitutional Right of Accused to Counsel. See CRIM. LAW, 10.

Limitation on Privilege of Arguing to Jury. See CRIM. LAW, 10.

Example of Abuse of Discretion of Court. See CRIM. LAW, 11.

Effect of Disapproval of by Judge. See APPEAL, 30.

ARSON.

CORPUS DELICTI — CORROBORATION OF CONFESSION.

On a prosecution for arson, where the building described in the indictment is conceded to have been burned, and there is some evidence that it was of incendiary origin, the *corpus delicti* is sufficiently shown to render defendant's confession admissible. *State v. Rogoway*, 601.

ASSESSMENT.

Unoccupied Land — How Assessable. See **TAXATION**, 2.

Scheme in Force Prior to 1901. See **TAXATION**, 4.

ATTACHMENT.

CONSTRUCTION OF ATTACHMENT STATUTES — NAMES OF PARTIES.

1. Attachment proceedings are strictly construed and must be exactly complied with. Under this rule the names of the parties to an action must be stated with precise correctness in the certificate of attachment required by Section 301, B. & C. Comp. *McDowell v. Parry*, 99.

DEFECTIVE CERTIFICATE OF ATTACHMENT.

2. Under B. & C. Comp. § 301, providing that in attaching real property the sheriff shall make and file a certificate containing the names of the parties, etc., a certificate giving the name of a party as "A. W. K." when in reality his name was "W. A. K." is fatally defective, even though in the body of the document the name was correctly stated. *McDowell v. Parry*, 99.

ALTERED RETURN — EVIDENCE TO CONTRADICT.

3. A certificate of attachment appearing to have been changed by having written on it different initials in pencil above some of those originally written, is *prima facie* correct as first prepared, and very strong evidence will be required to show that the alteration was made before filing. *McDowell v. Parry*, 99.

AUTREFOIS ACQUIT AND CONVICT.

Plea of Must be Made During Trial. See **CRIM. LAW**, 9.

BARBERS.

Act of 1903 No Delegation of Arbitrary Power. See **CONST. LAW**, 2.

Act of 1903 — Duty of Board in Prescribing Rules. See **LICENSES**.

Act of 1903 — Sufficiency of Title. See **STATUTES**.

BILL OF EXCEPTIONS.

Errors Must be Stated in Bill to be Available. See **APPEAL**, 13, 14.

Absence of Bill — Question Before Appellate Court. See **APPEAL**, 15, 16.

BILL OF REVIEW.

IMPEACHING DECREE BY CORRECTING MANDATE.

Where it is claimed that the enforcement of a judgment or decree will be inequitable, owing to occurrences since its rendition, or the discovery of testimony that would probably have produced a different result in the case, and reasonable diligence has been used, the remedy is not by a motion to recall or modify the mandate, but is by an original suit of impeachment in the nature of a bill of review. *McLeod v. Lloyd*, 67.

BILLS AND NOTES.

Implied Power of General Corporate Manager. See **CORPORATIONS**, 3, 4, 5.

BLACKSMITH

As Fellow-Servant With Helper of Another Workman. See **MAST. & SERV.** 1.

BOARD.

Presumption That Public Board Acted Within Its Authority. See **APPEAL**, 24.

BOAT LIENS.

When Right to Enforce Accrues. See **MARITIME LIENS**.

BRIDGES.**STATUTORY LIABILITY OF COUNTY FOR DEFECTIVE HIGHWAY.**

1. The legislative act imposing upon counties a liability for injuries received by reason of defective public roads or bridges (Laws 1903, pp. 262, 280, § 59,) applies only to legal county roads. *Schroeder v. Multnomah County*, 92.

CITY BRIDGE NOT A LEGAL COUNTY ROAD.

2. The streets of a city, in which term is included bridges connecting streets, are not included in the expression "a legal county road," used in the statute imposing a liability on counties for injuries resulting from defects in such roads (Laws 1893, p. 141, § 1, now Section 4781, B. & C. Comp.), even though the duty of caring for such streets or bridges may have been placed upon the county.

Schroeder v. Multnomah County, 92.

ACCIDENT ON MORRISON-STREET BRIDGE.

3. Multnomah County is not liable for any damages resulting from the accidental breaking of part of the Morrison-street Bridge on July 31, 1903, as that structure is not part of any legal county road.

Schroeder v. Multnomah County, 92.

ESTABLISHMENT—EFFECT OF FRANCHISE FIXING POSITION.

4. A legislative franchise to bridge a river flowing through a city, having given the grantee an option to locate it at any street that might be selected, and having provided that one of the approaches must conform to the grade of a certain street running at right angles to the direction of the bridge, the fact that the selection of the street is optional with the grantee does not render the statute any the less effective in establishing the grade of the selected street between the end of the bridge and the cross street as a straight line. In other words, such act is a change of the grade of the selected street between the cross street and the water's edge.

Mead v. Portland, 1.

BRIEFS.

Effect of Slight Delay in Filing. See **APPEAL**, 17.

BUILDING AND LOAN ASSOCIATIONS.**RIGHT TO CANCELLATION OF USURIOUS MORTGAGE.**

1. Where the payments made on an usurious loan, applied at the legal rate of interest, amount to the sum justly due, the borrower is entitled to have the payments properly applied and the debt and the mortgage securing it canceled.

Egan v. North American Loan Co. 131.

WHO MAY SUE TO CANCEL BUILDING AND LOAN MORTGAGE.

2. A grantee of real property subject to an usurious mortgage who did not assume the debt, but merely took the land subject to it, may plead usury against the mortgagee as to all payments that have been made.

Egan v. North American Loan Co. 131.

CASES IN OREGON REPORTS, Approved, Cited, Distinguished, and Overruled in this Volume. Same as **OREGON CASES**.

CERTIFICATE.

Defective Return on Writ—Names of Parties. See **ATTACHMENT**, 1, 2.

Prima Facie Effect of Changes on Face of. See **ATTACHMENT**, 3.

CESTUI QUE TRUST.

Construction of Deed—Waiver of Beneficial Terms. See **TRUSTS**, 1, 2.

CHARGING JURY.

Effect of Instruction to Disregard Certain Evidence. See **APPEAL**, 29, 30.

Effect of Instructing on Abstract Propositions. See **APPEAL**, 31.

Special Instructions Must be Directly Requested. See **APPEAL**, 32.

Right to Reject Instructions Already Given. See **TRIAL**, 13.

When Peremptory Direction May be Given. See **TRIAL**, 6.

Duty of Judge When Evidence is Conflicting. See **TRIAL**, 3, 4, 5.

CHARTERS OF CITIES.

Portland, 1903, § 191, *State ex rel. v Williams*, 322.

CHATTEL MORTGAGE.

BILL OF SALE AS MORTGAGE—FORM OF EXECUTION.

Under the provisions of Section 5630, B. & C. Comp., requiring that instruments intended to operate as chattel mortgages "shall" be executed, witnessed, and acknowledged as conveyances of real property, such instruments must be so acknowledged or they are defective. *Culver v. Randle*, 491.

CHATTELS.

Specific Performance of Contract to Sell. See SPEC. PERF. 1, 2, 3.

CHILD.

Rights of Parents—Imputation of Negligence. See NEGLIGENCE, 3.

When Child is Presumed to Have Discretion. See NEGLIGENCE, 2.

CIPHER DISPATCH.

Damages Recoverable for Changes in Transmission. See TELEGRAPHS, 3.

CIRCUIT COURT.

Power of, to Order Completion of Defective Record in Case Appealed from Justice's Court. See COURTS.

CITIES. Same as MUNICIPAL CORPORATIONS.

CITY ORDINANCES. Same as ORDINANCES OF CITIES.

CLAIM AND DELIVERY. Same as REPLEVIN.

CLAIMS.

Against Estates of Decedents—Presentation—Effect of Not Considering—Evidence of Presentation—Evidence Necessary to Support Rejected Claim. See EX'RS & ADM'RS 2, 3, 4, 5, 6.

CLOUD ON TITLE. Same as QUIETING TITLE

CODE CITATIONS. Same as STATUTES OF OREGON.

COLOR OF TITLE.

Need of to Support Suit to Quiet Title. See QUIETING TITLE, 1.

COMITY.

Rights of Foreign Receiver—Permission to Sue. See RECEIVERS.

COMMENCEMENT OF ACTION. Same as LIMITATION OF ACTIONS.

COMMERCIAL PAPER.

Power of Corporation General Manager to Issue. See CORPORATIONS, 3, 4, 5.

COMMERCIAL TRAVELERS.

Implied Power of to Sell Their Samples. See PRIN. & AGENT, 2.

COMPETENCY of Evidence. See EVIDENCE, 3, 4.

COMPROMISE AND SETTLEMENT.

Plaintiff sold beets to defendant by the ton, the beets being weighed in car-load lots at defendant's factory on the railroad scales; and, a controversy arising as to the number of tons delivered, it was agreed, by way of settlement, that during the next season plaintiff should load specified cars in the same manner in which beets had been delivered before; that they should be weighed on corrected scales, and any difference in weight should be adjusted. *Held*, in an action for the price of beets delivered the first season, that it was a question for the jury

whether a certain car furnished under the compromise agreement was intended by the parties to be used as a substitute for one of the cars specified in the agreement. *Oliver v. Oregon Sugar Co.* 77.

CONCLUSIONS.

Value of on Appeal in Equity Cases. See APPEAL, 37.
Are Not Admitted by Demurrer. See PLEADING, 4.
Construction of Uncertain Statement. See APPEAL, 41.

CONFESSION.

Freedom of is Question for Trial Court. See CRIM. LAW, 4.
Corroboration of — Corpus Delicti. See CRIM. LAW, 5.

CONSTITUTIONAL LAW.

DELEGATION OF LEGISLATIVE POWER.

1. A legislature cannot delegate the power of making laws, or invest any person or board with an arbitrary discretion, but it can delegate the right to adopt suitable regulations or requirements connected with the enforcement of an act, such as the right to determine the qualifications of applicants for licenses to practice trades or professions requiring particular knowledge or skill. *State v. Briggs*, 366.

IDEM.

2. An act such as Laws 1908, p. 27, prohibiting every unlicensed person from practicing the barber's trade or conducting a school of barbering, and providing for the appointment of a state barber board with power to prescribe the qualifications of barbers, is not unconstitutional as conferring arbitrary power on the board, in that the act does not prescribe the standard of knowledge or qualification required of prospective barbers. *State v. Briggs*, 366.

LIMITING ARGUMENT TO TIME FOR FULL PRESENTATION OF CASE.

3. The right to a full hearing of his case by counsel being secured to every defendant by Section 11 of the Oregon Bill of Rights and the Sixth Amendment to the Constitution of the United States, the trial court cannot arbitrarily limit the time for argument in a criminal case to a period within which no fair or comprehensive review of the evidence can be given. *State v. Rogoway*, 601.

CONSTITUTION OF OREGON.

Article I, § 10, p. 587.
Article IV, § 20, p. 366.
§ 23, Subd. 7, p. 98.
Article XI, § 3, pp. 553, 564.
Bill of Rights, § 11, pp. 602, 612.

CONSTITUTION OF THE UNITED STATES.

Sixth Amendment, pp. 602, 612.

CONSTRUCTIVE TRUSTS. See *Kroll v. Coach*, 459.

CONTINUANCE.

Discretion in Postponing Criminal Trial. See CRIM. LAW, 16.

CONTRACTS.

MUTUALITY OF CONTRACTS OF SALE ON CONDITION OF QUALITY.

1. A contract of sale binding one party to sell and the other to buy a certain quantity of property of a designated quality is not unilateral because the determination of the quality or quantity is left to some third person or even to one of the parties, the legal implication being that each shall act honestly and fairly. *Livesley v. Johnston*, 30.

IDEM.

2. A contract by which one party sells and agrees to deliver to the other party a certain part of particular crops to be raised during a series of years, and such

other party agrees to buy such part of said crops at a specified price, payable in certain installments, if, in the purchaser's judgment, the condition of the crop will warrant it, and to advance each year certain amounts for cultivation, to be deducted at the time of the final payment, provided that in case of a shortage in the crop from causes beyond the control of the first party, he shall be liable to repay only the advances, is mutual and enforceable. *Livesley v. Heise*, 148.

ILLUSTRATION OF MUTUAL CONTRACT TO SELL AND BUY.

3. This case affords an illustration of the application of the rule above stated: A contract by which a grower agrees to sell and deliver a specified quantity of his crop of hops, and the buyer agrees to pay therefor a certain price in partial payments at stated times, is not wanting in mutuality because it provides that if the hops be of a lesser quality than agreed on, or not delivered in the condition agreed on, "according to the judgment" of the buyer, he shall still have the privilege of taking them, or enough to cover the advances, at a reduction in price equal to the difference in value between them and hops of the quality contracted for, or because it provides that the buyer shall have the right to determine at picking time whether the crop is in proper condition, and, if it is not in such condition, the buyer shall be released from obligation to furnish picking money. In these contingencies the legal obligation rests on both parties to be fair, and if either is not, the other party has a remedy, so the contract is quite bilateral.

Livesley v. Johnston, 30.

CONTRACT FOR SERVICES — CONSTRUCTION.

4. Where a newspaper carrier route contract required the carrier to deliver the paper to all paying subscribers within a designated territory, to endeavor to increase its circulation, to collect subscriptions, and to pay weekly for all papers taken from the office, receiving as compensation for his labor a certain proportion of the subscription price of the papers, and declared that the relation should continue until one party or the other considered a separation necessary, and, if the parties were then unable to agree on a proper method of doing so, arbitrators should be appointed, either party could terminate the contract at his election, subject to liability to the other for such damages as resulted therefrom.

Harlow v. Oregonian Pub. Co. 520.

CONTRIBUTION.

Difference Between Law and Equity Jurisdictions. See PRIN. & SURETY, 2.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, 4.

CONVERSION. Same as TROVER.

CORPORATIONS.

EVIDENCE OF CORPORATE EXISTENCE.

1. Where it appears in an action of ejectment that the United States conveyed land by patent to a company as a corporation, that the State had donated land to the same patentee as a body corporate, and that the patentee assumed to convey the lands in a corporate capacity, its legal identity as a corporation is *prima facie* established, rendering admissible for plaintiff, who claimed under the corporation, a deed purporting to have been executed by the corporation.

Altschul v. Casey, 182.

OFFICERS — PRESUMED KNOWLEDGE OF AS TO POWER OF AGENTS.

2. Corporate officers are chargeable with knowledge of the extent of the authority of agents and other officers of their corporations, and as to them the doctrine of implied authority is not applicable.

Baines v. Coos Bay Navigation Co. 307.

IMPLIED POWER OF GENERAL MANAGERS.

3. Excepting in banks, managing agents of corporations have no implied power to issue, accept, or indorse negotiable paper on behalf of their principals, unless there are pressing legitimate demands and the manager is without funds.

Baines v. Coos Bay Navigation Co. 307.

POWER OF MANAGER TO ISSUE NOTES.

4. The general manager of a corporation having entire control of its affairs, has implied power to issue negotiable paper in the name of the corporation for its benefit, particularly where he owns all the stock and is practically the company.

Baines v. Coos Bay Navigation Co. 307.

POWER OF CORPORATION MANAGER IS QUESTION FOR JURY.

5. In an action on the notes of a corporation executed by the general manager to secure the release of pressing demands against the company, the question whether the manager had implied power to execute the notes should be submitted to the jury.

Baines v. Coos Bay Navigation Co. 307.

CORPORATE CONVEYANCES—PRESUMED POWER OF GRANTOR.

6. The authority of a corporate grantor to execute a deed is presumptively established after a lapse of more than thirty years, where it appears on the face of the deed that the corporation caused it to be executed, and the deed was subsequently litigated, and its validity recognized.

Altshul v. Casey, 182.

IDEM—SIGNATURES TO DEED BY CORPORATION.

7. A deed purporting to be a conveyance by a named corporation is sufficiently executed where the president and secretary sign it on behalf of the corporate body.

Altshul v. Casey, 182.

IDEM—EXECUTION OF CORPORATE DEED—SEAL.

8. The use by the recorder of deeds of the letters "L. S." is a sufficient representation of the seal of a corporate grantor in a recorded deed, and presumptively the corporate seal was on the original.

Altshul v. Casey, 182.

LIABILITY OF SUBSCRIBERS FOR UNPAID STOCK SUBSCRIPTIONS.

9. Under Const. Or. Art. XI, § 3, making stockholders liable for the debts of a corporation to the amount of their stock subscribed and unpaid, and B. & C. Comp. § 5065, providing that all sales of stock shall subject the purchaser to the payment of any balance due on the stock, a stockholder in an insolvent corporation is liable for the debts of the corporation to the extent of the unpaid part of his subscription, his liability being an asset of the corporation which may be reached by a suit in equity.

Macbeth v. Banfield, 558.

RIGHT TO PAY STOCK SUBSCRIPTION WITH PROPERTY.

10. In the absence of a constitutional or statutory inhibition, the directors of a corporation may receive property in payment for stock in any case in which they are authorized under the articles of the corporation to purchase for the benefit of the corporation; but where they do so the property received must be equal in worth to the par value of the stock thus paid for.

Macbeth v. Banfield, 558.

DOCTRINE OF TRUST FUND AS TO UNPAID STOCK SUBSCRIPTIONS.

11. While it is a going concern a corporation may dispose of its assets, including the sums received on stock subscriptions, the corporate charter permitting, and no trust arises with reference thereto; but when insolvency occurs all assets, including unpaid subscriptions, become trust funds for the benefit of creditors.

Macbeth v. Banfield, 558.

FRAUD IN PAYING STOCK SUBSCRIPTIONS—OVERVALUED PROPERTY.

12. A payment of stock subscriptions with property may be attacked by creditors for either actual or legal fraud—the result is the same in both cases, the manner of proof, only, being different.

Macbeth v. Banfield, 558.

GOOD FAITH IN ACCEPTING PROPERTY FOR STOCK SUBSCRIPTIONS.

13. In determining whether the directors of a corporation were guilty of fraud in taking property in exchange for stock, it is competent to consider the nature of the property, the purposes for which it was accepted, and all the circumstances attending the transaction; and, if it appears that they have acted in good faith,

and that an overvaluation may have been due to an honest error of judgment, their acts are conclusive. *Macbeth v. Banfield*, 558.

EXTENT OF LIABILITY ON SUBSCRIPTIONS TO STOCK.

14. Where stock is issued by directors for property taken at an overvaluation, it is competent, at the instance of creditors, to compel the stockholders to respond with money for the difference between the actual value of such property and the par value of the stock. *Macbeth v. Banfield*, 558

CORPUS DELICTI.

Proof of, Sufficient to Justify Admission of Confession. See CRIM. LAW, 5.

COSTS.

SERVICE OF COST BILLS IN SUPREME COURT.

1. Section 568, B. & C. Comp., as amended by Laws 1903, p. 209, § 1, relating to the allowance of disbursements in the supreme court, requires that the statement of the items claimed shall be served on the adverse party, whether he has appeared or not, if filed more than five days after the rendition of the judgment or decree—if filed within that time the statement need not be served on any one. *Egan v. North American Loan Co.* 131.

JUSTICE'S COURTS—COSTS ON DISMISSING APPEAL.

2. After a circuit court has acquired jurisdiction of a case appealed from a justice's court it may give judgment for costs on dismissing the appeal. *Hager v. Knapp*, 512.

Appeal from Order Settling Disputed Costs—Retrial of Merits in Circuit Court. See JUSTICES OF THE PEACE, 1.

Order Settling Costs Not a Final Order. See APPEAL, 5.

COSURETIES.

Liability of for Contribution to Surety. See PRIN. & SURETY.

COUNTERCLAIM.

Items Available to Executor de Son Tort. See EX'RS & ADM'RS, 14-17.

COUNTIES.

LIABILITY OF COUNTY FOR INJURY FROM DEFECT IN HIGHWAY.

1. Unless made so by statute, a county is not liable for injuries resulting from defects in public highways, even though it is required to keep the highway in repair and is given power to provide money for that purpose. *Schroeder v. Multnomah County*, 92.

STATUTORY LIABILITY OF COUNTY FOR DEFECTIVE HIGHWAY.

2. The legislative act imposing upon counties a liability for injuries received by reason of defective public roads or bridges (Laws 1903, pp. 282, 280, § 50,) applies only to legal county roads. *Schroeder v. Multnomah County*, 92.

CITY BRIDGE NOT A LEGAL COUNTY ROAD.

3. The streets of a city, in which term is included bridges connecting streets, are not included in the expression "a legal county road," used in the statute imposing a liability on counties for injuries resulting from defects in such roads (Laws 1889, p. 141, § 1, now Section 141, B. & C. Comp.), even though the duty of caring for such streets or bridges may have been placed upon the county. *Schroeder v. Multnomah County*, 92.

COUNTY COURT.

Jurisdiction of Equity to Review Final Orders of, in Probate Where Fraudulent—Remedy at Law. See EQUITY, 1, 2.

Example of Fraudulent Order. See EXECUTORS, 9.

COUNTY ROADS. Same as HIGHWAYS.

COURTS.

APPEALS FROM JUSTICE'S COURTS—SUPPLYING DIMINISHED RECORD.

1. The authority of circuit courts in Oregon to correct the record in a case appealed from a justice's court, or to supply omissions from such a record, not being controlled by statute, is found in the inherent power of superior courts to control inferior tribunals, and is discretionary. *Hager v. Knapp*, 512.

DISCRETION IN SUPPLYING DIMINISHED RECORD

2. Though a superior court may, on its own motion, award a certiorari to a justice's court to correct a transcript on appeal, when an inspection thereof discloses that important parts of the record have been omitted, the general rule is that it will not do so when by failure or neglect of the appellant the transcript is too imperfect to show affirmatively the grounds of error relied upon.

Hager v. Knapp, 512.

CRIMINAL LAW.

INTENT AS AN ELEMENT OF CRIME.

1. Of the participants in an act of adultery one may be innocent and the other guilty, through a difference in their knowledge of conditions.

State v. Eggleston, 346.

OTHER OFFENSES.

2. On a prosecution for adultery, evidence that defendant and the female participant committed adultery at other places and on other occasions than the time and place charged in the information is admissible as tending to show the adulterous disposition of the participants at the time alleged in the information, even though it does show the commission of another crime than the one charged.

State v. Eggleston, 346.

MATERIALITY—PROOF OF TIME ALLEGED.

3. Under Section 1309, B. & C. Comp., the exact time of the commission of an offense need not be precisely stated, unless time is a material element in the case, and the jury may with propriety be told that proof as to time is sufficient if it shows the offense to have been committed within "a month or more" of the date charged.

State v. Eggleston, 346.

ADMISSIBILITY OF CONFESSIONS—PRACTICE.

4. The determination of the court on a criminal trial that a confession of defendant was obtained from him without the influence of hope or fear exercised by a third person, will not be disturbed on review unless there is clear and manifest error.

State v. Rogoway, 601.

CORROBORATION OF CONFESSION—PROOF OF CORPUS DELICTI.

5. The proof of the *corpus delicti* that will be sufficient to justify the admission of a confession freely made need not be conclusive, but it must fairly tend to show that the crime charged has been committed.

State v. Rogoway, 601.

EVIDENCE AT FORMER TRIAL—IMPEACHMENT.

6. It is competent to show by persons who were present and heard that an impeaching witness is mistaken in saying that statements on a certain subject made by the person impeached were different on a prior occasion from those made in court on the same subject.

State v. Houghton, 110.

RIGHT TO TRIAL AT NEXT TERM.

7. The words "next term" in Section 1551, B. & C. Comp., providing that if a defendant whose trial has not been postponed on his application, or by his consent, be not brought "to trial at the next term of the court in which the indictment is triable, after it is found," the court must order the indictment dismissed, except for cause, do not include the current term at which the indictment was found, and hence defendant is not entitled to either a trial or a dismissal at that term.

State v. Breaw, 586.

TRIAL—WAIVING FILING OF MANDATE AFTER REVERSAL.

8. Though a defendant, before a second trial, may insist upon the entering of the mandate of the supreme court reversing a prior conviction (B. & C. Comp. §§ 1487 and 1488), such action is not jurisdictional, and the defendant waives it if the retrial proceeds without the point being urged. *State v. Houghton*, 110.

TRIAL—WAIVER OF PLEA OF FORMER ACQUITTAL.

9. The defense of a former conviction or acquittal is one that may be waived by the defendant, being a personal privilege, and must be raised at the trial to be available. When the point is first made on a motion for a new trial it comes too late. *State v. Houghton*, 110.

ARGUMENT OF COUNSEL—CONSTITUTIONAL RIGHT TO TIME FOR.

10. The right to a full hearing of his case by counsel being secured to every defendant by Section 11 of the Oregon Bill of Rights and the Sixth Amendment to the Constitution of the United States, the trial court cannot arbitrarily limit the time for argument in a criminal case to a period within which no fair or comprehensive review of the evidence can be given—though it is the right of the trial judge to exercise such a supervision over the argument as will prevent an abuse of the right guaranteed. *State v. Rogoway*, 601.

EXAMPLE OF ABUSE OF DISCRETION IN LIMITING ARGUMENT.

11. When a criminal trial has required three days, during which twenty witnesses were examined and fifty exhibits were introduced, the evidence being circumstantial and conflicting, it is reversible error to limit defendant's counsel to only one hour in argument. *State v. Rogoway*, 601.

INSTRUCTIONS MUST PRESENT RESPECTIVE THEORIES OF PARTIES.

12. A party who has offered evidence in support of the issues on his part is entitled to instructions that will present his theory of the case to the jury for consideration. *State v. Teller*, 571.

CURING ERROR BY INSTRUCTION.

13. Error in admitting testimony which the court subsequently concludes was incompetent is cured by a statement withdrawing such testimony and an instruction at the close of the case to disregard it. *State v. Eggleston*, 346.

REQUEST FOR INSTRUCTIONS.

14. Error is not assignable for failure of the court to charge the jury that the crime must have been committed in the county named, unless a request was made for such an instruction. *State v. Eggleston*, 346.

IDEM.

15. If an instruction to acquit the defendant for failure of proof in any particular is desired it must be specially requested. *State v. Eggleston*, 346.

POSTPONING CRIMINAL TRIAL—DISCRETION.

16. The action of a trial court in postponing the trial of a criminal case to another term on the statement of the district attorney, as authorized by B. & C. Comp. § 1379, cannot be reviewed except for abuse of discretion. *State v. Breaw*, 586.

PROCEEDINGS NOT IN RECORD.

17. Where errors alleged to have been committed by the court are not set out in the bill of exceptions, they are unavailing on appeal. *State v. Eggleston*, 346.

PRESUMPTION AS TO SUFFICIENCY OF EVIDENCE.

18. Where the trial court was not requested to instruct the jury to acquit the defendant in a criminal case by reason of any failure of proof, it will be presumed, on appeal from a conviction that the evidence was sufficient. *State v. Eggleston*, 346.

UNEXECUTED DEATH WARRANT—FIXING NEW DATE.

19. Where the time for executing a capital sentence is not part of the judgment, but is fixed by the court, the warrant does not expire (unless it is specially so provided) and is not affected by a failure to execute it at the appointed time. In such cases the better practice is for the court from which the warrant issued to assign a new date for the execution. *State v. Armstrong*, 25.

See ADULTERY—INDICTMENT—JURY—LARCENY—PERJURY.

CROP LEASE.

Assignability of Without Landlord's Consent. See LAND. & TEN. 3.

CROSS COMPLAINT in Law Actions. See EQUITY, 7, 8, 9.

CROSS-EXAMINATION.

Examples of Proper Cross Questioning. See WITNESSES, 3, 4, 5.

CURING ERROR.

Effect of Instruction to Disregard Testimony. See APPEAL, 29.

Effect of Disapproving Misconduct of Counsel. See APPEAL, 30.

DAMAGES.**PERSONAL INJURY—ALLEGATIONS AND PROOFS—NERVOUS SHOCK.**

1. Under a general allegation of damages recovery cannot be had for injuries resulting from fright or nervous shock, those not being the usual or necessary effects of a physical injury. *Adcock v. Oregon Railroad Co.* 173.

PERSONAL INJURY—EVIDENCE OF NERVOUS CONDITION AFTERWARDS.

2. In an action for personal injuries, in which no injury to the nervous system was alleged, and counsel disclaimed any intention of showing such injury as an item of damage, evidence that plaintiff had been nervous since the accident was not objectional as relating to an element of damage not claimed by the complaint, but is competent as tending to show her general manner and condition. *Adcock v. Oregon Railroad Co.* 173.

PERSONAL INJURY—INFERENCE FROM SUBSEQUENT CONDITION.

3. In an action for personal injuries, in which it appears that plaintiff was strong and robust before the accident, and had been nervous since, an inference that the nervousness was the result of the physical injury was justified. *Adcock v. Oregon Railroad Co.* 173.

MITIGATION—INJURY BY OTHERS.

4. In an action for damages caused by a trespass on grazing land, the defendant may show that others were intruding on the same property at the same time, and inflicted part of the injury complained of. *Pacific Livestock Co. v. Murray*, 103.

MEASURE OF DAMAGES FOR TRESPASS ON GRASS.

5. The measure of damages caused by a trespass on grazing land is the reasonable value to the plaintiff of the destroyed verdure, and the value of the injury to the freehold. *Pacific Livestock Co. v. Murray*, 103.

POWER OF COURT TO REMIT PART OF EXCESSIVE VERDICT.

6. In an action for personal injuries, the court has power to order a remission of a part of the damages awarded by the verdict, as a condition of overruling a motion for a new trial. *Adcock v. Oregon Railroad Co.* 173.

POWER TO REMIT PART OF PREJUDICED OR PASSIONATE VERDICT.

7. Where it clearly appears that the jury in a damage action were influenced by passion or prejudice, the error cannot be cured by remitting a part of the verdict, but a new trial must be granted. *Adcock v. Oregon Railroad Co.* 173.

See TELEGRAPHS, 1, 2, 3; TROVER, 3, 4.

DEATH WARRANT.

Effect of Not Enforcing at Date Fixed — Jurisdiction of Trial Court to Set New Date for Execution. See CRIM. LAW, 19.

DECEDENTS. Same as EXECUTORS & ADMINISTRATORS.

DEEDS.

SIGNATURES — IDEM SONANS.

The fact that the heirs of a man named Clark signed as Clarke a deed to property inherited from him is a mere unimportant irregularity in the chain of title. *Altschul v. Casey*, 182.

Signatures to Corporate Conveyance. See CORPORATIONS, 7.

Seal on Conveyance — Letters L. S. See CORPORATIONS, 8.

Title Conveyed by Tax Deed. See TAXATION, 5.

Trust Deed — Waiver by Cestui Que Trust. See TRUSTS, 1, 2.

DEFAULT.

Application to Open — Tendering Answer. See JUDGMENT, 1.

Effect of on Marriage Relation. See DIVORCE.

DEFINITIONS. Same as WORDS & PHRASES.

DEGREE OF PROOF Required in Civil Cases. See EVIDENCE, 10.

DELAY in Bringing Suit — Effect of. See EQUITY, 11, 12.

DELEGATION OF POWER.

Barber Law of 1903 — Authority of Commission. See CONST. LAW, 1, 2.

DEMURRER.

Effect of as an Admission — Facts — Conclusions. See PLEADING, 4.

DEPOSITIONS.

OBJECTIONS AVAILABLE AT TRIAL.

1. Objections to a deposition going only to the time or manner of taking it must be made by a motion to suppress, and will not be considered unless made before trial. *Oliver v. Oregon Sugar Co.* 77.

WAIVER OF OBJECTION TO DEPOSITION — CONSTRUCTION OF STIPULATION.

2. A stipulation consenting to the use of a typewritten copy of the testimony of certain decrepit witnesses instead of the original, is not a waiver of proof that the witnesses were still infirm and unable to appear, which Section 840, B. & C. Comp., requires to be shown before such depositions can be used.

Carter v. Wakeman, 427.

PRESUMPTION OF CONTINUED INFIRMITY OF WITNESS.

3. The provision of Section 840, B. & C. Comp., that before the deposition of an infirm witness can be used, it must be shown that the infirmity continues, is not affected by the presumption of the continuance of things once shown to exist, declared by B. & C. Comp. § 783, subd. 33, so that before such depositions can be read proof of continued infirmity must be made.

Carter v. Wakeman, 427.

DIMINUTION of Record,

Discretion of Circuit Court in Supplying Papers Omitted From Transcript by Justice of the Peace. See COURTS, 2.

DIRECTING VERDICT. See TRIAL, 4, 5, 6.

DIRECTORS of Corporations.

Discretion of in Accepting Property for Stock. See CORPORATIONS, 10, 13.

DISBURSEMENTS. Same as COSTS.

DISCRETION.

- Amending Pleadings—Wise Discretion. See PLEADING, 1, 2.
- Opening Default—Good Faith of Applicant. See JUDGMENT, 3, 4.
- By Circuit Court to Order Missing Papers Supplied in Case of Diminished Record From Inferior Court. See COURTS, 1, 2.
- Controlling Argument of Counsel. See CRIM. LAW, 10.
- Admitting Confessions as Freely Made. See CRIM. LAW, 4.

DISMISSING APPEAL.

- Disappearance of Subject-Matter of Litigation. See APPEAL, 18, 19.
- Regularity of Appeal to Circuit Court Not Discussable. See APPEAL, 3.

DISPUTED FACTS. Instructions. See TRIAL, 4, 5, 6.**DISSOLUTION**

- Of Partnership—Increase of Plant as Profits. See PARTNERSHIP.

DIVORCE.**DATE OF TERMINATION OF MARRIAGE IN DEFAULT CASE.**

In view of the provision of Section 548 of B. & C. Comp., that no appeal can be taken from a default decree, a final order of divorce entered for want of an answer operates to at once terminate the marriage relation. *State v. Leasia*, 410.

DOCKETS.

- Effect of Entering Judgment in Defective Docket. See JUDGMENT, 15.

DRUMMERS.

- Authority of to Sell Samples. See PRIN. & AGENT, 2, 3.

EJECTMENT.**SUPERIORITY OF TITLE IS JURY QUESTION.**

1. Where plaintiff in an action of ejectment set up a paper title, and established a *prima facie* case, and defendant claimed title by adverse possession, and offered proof in support of it, the question of the superiority of their respective rights was for the jury, under proper instructions as to the effect of the documentary evidence. *Allschul v. Casey*, 182.

IRREGULAR DEED AS EVIDENCE.

2. In an action of ejectment in which plaintiff claimed title to the land in controversy by legal conveyances, a deed to the property by one through whom plaintiff claimed, purporting to pass the title to a corporation not a party to the record, offered by defendant to show that plaintiff could not be the owner, is entitled to no weight as evidence, where it appears that the deed has been litigated, and declared to be a fraud on the grantor, as having been executed by an attorney in fact of the grantor without the requisite authority. *Allschul v. Casey*, 182.

PROOF OF TITLE BY RESPECTIVE PARTIES.

3. In ejectment plaintiff need prove only an apparently good title to prevail over simple denials; and if the defendant relies affirmatively on any title he must allege and prove it. *Allschul v. Casey*, 182.

PRESUMPTION FROM LONG CONTINUED CONDUCT.

4. Where all the owners of a tract of land subsequent to the time of the execution of a deed purporting to have been signed by the heirs of a former owner, have acted in reference to such property as though the deed had been signed by every heir, it will be presumed after a lapse of twenty years that the signers were all the heirs of such former owner. *Allschul v. Casey*, 182.

EFFECT OF FRAUD ON PARTY CLAIMING UNDER IT.

5. In an ejectment action by a fraudulent grantee of the land against a purchaser under a subsequent judgment, the fraud is a defense, the purchaser having obtained the legal title subject to the record of the fraudulent deed. *Wood v. Fisk*, 276.

MEASURE AND ELEMENTS OF DAMAGES.

6. Under Section 326, B. & C. Comp., which permits a plaintiff in an ejectment action to recover damages, an aggrieved party is entitled to recover all damages fairly resulting from the wrong complained of, if they are properly pleaded, as, that by reason of being excluded from possession plaintiff was prevented from constructing a building on the land in dispute in which to conduct his business, and was deprived of free access to other land not in dispute.

Trotter v. Town of Slayton, 301.

EMINENT DOMAIN.

RIGHT ACQUIRED BY ACCEPTANCE OF PUBLIC FRANCHISE.

Where a municipal corporation, in pursuance of legislative authority grants a privilege or right to use or occupy a public street for a public purpose, and the grantee, in reliance on the grant, expends money in developing the grant, he acquires a property interest or right which can be taken away only under the power of eminent domain, and after proper compensation.

Mead v. Portland, 1.

EQUITY.

JURISDICTION TO SET ASIDE FINAL PROBATE ORDERS.

1. A court of equity has jurisdiction to set aside a decree of a county court approving and settling the final account of an administrator, procured by fraud, notwithstanding Section 911, B. & C. Comp., giving the county court exclusive jurisdiction, in the first instance, to conduct and settle the accounts of administrators. This remedy, however, cannot be used to correct errors or irregularities, or to escape the results of neglect.

Froebrich v. Lane, 18.

JURISDICTION OVER FINAL ORDERS IN PROBATE.

2. A decree approving and settling the final account of an administrator is such a final order as may be set aside in equity for fraud, though the property or fund has not been distributed nor the administrator discharged.

Froebrich v. Lane, 13.

JURISDICTION TO RECOVER PROCEEDS OF TRUST FUNDS.

3. Where the holder of an option of purchase induces others to join with him on a representation that for specified proportions of the price they shall have corresponding interests in the property, but fraudulently misstates the price so that the other purchasers are deceived and do not really get the proportions that they paid for, the difference going to the optioner, such purchasers may either sue for damages at law or have an equitable decree for the conveyance of the interests that they really bought.

Kroll v. Coach, 450.

JURISDICTION TO ENFORCE CONTRACT OF SALE.

4. A fraudulent combination between one who has contracted to sell property not yet in existence, a crop to be grown, for example, and others, to avoid compliance with the contract, is ground for equitable relief by requiring specific performance.

Livesley v. Heise, 148.

JURISDICTION TO ENFORCE CONTRACT TO CONVEY LAND.

5. The execution of a contract to convey land creates between the parties certain equitable and reciprocal rights as to the title and the payment of the purchase price that can be adjusted only in equity.

Flanagan Estate v. Great Central Land Co. 335.

DECREEING STRICT FORECLOSURE IN EQUITY.

6. A suit for a strict foreclosure of the vendee's rights under a contract to convey land is within the jurisdiction of equity.

Flanagan Estate v. Great Central Land Co. 335.

FILING EQUITABLE CROSS COMPLAINT—DEFENSE AT LAW.

7. Whenever a defendant sued at law is entitled to relief arising out of material facts cognizable only in equity, he may with his answer at law tender a cross-

bill in equity, even though the answer may have contained a complete defense. In such cases the test is whether the legal defense is as adequate and complete as the one that may be afforded in equity: B. & C. Comp. § 391.

Fire Association v. Allesina, 154.

IDEM.

8. While the fact that a certain conveyance of real estate was fraudulent as to the grantor's creditors is available as a defense at law, such defense would not relieve the land from the fraudulent deed as a cloud on the title, and the defendant in the action at law is entitled to file a complaint in equity in the nature of a cross-bill, as authorized by B. & C. Comp. § 391, to have such conveyance vacated on that ground, the law remedy being incomplete and inefficient in comparison with the equitable one.

Wood v. Fisk, 276.

IDEM.

9. In an action for conversion by a legal representative of a decedent against an executor de son tort the latter has an adequate remedy at law, so that he cannot maintain a cross suit in equity to recover the value of his expenditures.

Slate v. Henkle, 430.

MISTAKE—EXCUSABLE NEGLIGENCE—REMEDY AT LAW.

10. The right to relief in equity against a decree of the county court procured by fraud is not affected by Section 103, B. & C. Comp., providing for relief of a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, where the remedy therein provided has not been invoked.

Froebrich v. Lane, 13.

LACHES IN COMMENCING SUIT.

11. A delay of eight months in beginning a suit after receiving knowledge of the facts relied upon is not a fatal delay.

Froebrich v. Lane, 13.

IDEM.

12. Defendant may not urge the objection of laches because the suit was not brought at an earlier date, it being in no worse position for maintaining its defense, and having been involved in no expense or inconvenience on account of the delay.

Krause v. Oregon Steel Co. 378.

See INJUNCTION; MORTGAGES; SPECIFIC PERFORMANCE;
VENDOR & PURCHASER.

ERASURES.

Effect of on Documents—Explaining. See EVIDENCE, 7.

ESCROWS.

DELIVERY OF ESCROW DEED—RIGHTS OF SUBSEQUENT PURCHASER.

1. Where, under a contract for the sale of real estate, the deed was deposited in escrow, to be delivered on payment of the price after examination of the title by the purchaser's attorneys, and there was no understanding or stipulation that the deed should not be delivered unless the price was paid on a particular day, and no attempt was made to withdraw the deed before the conditions of the deposit had been complied with by the grantee, title passed to such grantee on delivery of the deed as against a purchaser from the grantor after the deed was delivered.

Wright v. Astoria Company, 224.

WHEN ESCROW BECOMES OPERATIVE.

2. A deed deposited in escrow does not become operative to convey the title until the performance of the conditions or happening of the event on which it was intended to be delivered to the grantee designated, where there is no incapacity on the part of the grantors. *Flanagan Estate v. Great Cent. Land Co.* 335.

ESTOPPEL.

LACK OF KNOWLEDGE OF PURCHASER.

1. A contract not of record and not known to a *bona fide* purchaser of the property thereby affected is not binding and there is no estoppel on such purchaser to deny its existence or effect.

Mead v. Portland, 1.

RIGHT OF GRANTEE OF MORTGAGED LAND TO PLEAD USURY.

2. A grantee of property burdened with an usurious mortgage, who did not assume to pay such incumbrance, is not estopped to plead usury as to payments made both before and after he bought. *Egan v. North American Loan Co.* 131.

WAIVER OF TERMS OF INSURANCE POLICY.

3. A waiver of a right necessarily involves on the part of the active power a knowledge of the right waived and of the facts relating to the matter: for instance, a premium or assessment on an insurance certificate having been remitted while the insured was suspended, and received at the head office after his death, the head officer, not being aware of his illness or death, cannot be said to have waived the suspension by keeping the assessment for a few weeks.

Miller v. Head Camp, 192.

Denying Validity of Previous Tax Deed. See TAXATION, 3; JUDGMENT, 7-14.

EVIDENCE.

PRESUMPTION OF CONTINUED INFIRMITY OF WITNESS.

1. The presumption of the continuance of conditions shown to have existed (B. & C. Comp. § 783, subd. 33) does not apply to the infirmity of a witness.

Carter v. Wakeman, 427.

PRESUMPTION OF CONTINUANCE OF MARRIAGE.

2. Such a presumption does obtain, however, in the case of a marriage shown to have been solemnized.

State v. Eggleston, 346.

COMPETENCY OF EVIDENCE UNDER THE PLEADINGS.

3. Evidence on disputed points is competent; for instance, under an issue as to the accuracy of certain scales at the time certain articles were weighed on them, it is competent to ask a witness if he knows the condition of the scales at the time of the weighing and what the condition was.

Oliver v. Oregon Sugar Co. 77.

COMPETENCY OF EXPLANATORY MATTER.

4. All the facts relating to a material question should be brought out if they are desired: for instance, in an action for conversion of a building claimed by both parties, it having been shown as an admission against interest that plaintiff had possession of the house and sold it, and that defendant then leased it from the vendee, defendant is entitled to explain his action.

Eldridge v. Hoefer, 239.

EFFECT OF ADMISSIONS OUTSIDE SCOPE OF AGENT'S AUTHORITY.

5. The statements of an agent, to be binding upon the principal, must have been made on a subject within the scope of the agent's authority, and at a time when that subject was being considered: for instance, in an action for conversion of sheep by one caring for them on shares, declarations of a person who delivered wool for defendant to a warehouseman as to the ownership of the sheep from which the wool was clipped were outside the scope of such person's authority as agent, and were inadmissible, he being employed simply to haul the wool to the warehouse.

Goltra v. Penland, 254.

WRITINGS NOT CONCLUSIVE BETWEEN PARTIES IN CASES OF FRAUD.

6. In a suit to compel restitution of property fraudulently withheld by an agent or trustee, a deed between the parties is not conclusive, it being part of the scheme by which the principal was deceived.

Kroll v. Coach, 450.

WRITINGS CONTRADICTING OFFICIAL RETURNS.

7. A certificate of attachment appearing to have been changed by having written on it different initials in pencil above some of those originally written, is *prima facie* correct as first prepared, and very strong evidence will be required to show that the alteration was made before filing.

McDowell v. Parry, 90.

PAROL EVIDENCE OF CONTENTS OF LOST WRITING.

8. Testimony of one witness that she heard defendant read a letter that he had written to a third person, which letter he had hidden, and that she had not been able to find it, is sufficient evidence of the letter to justify oral proof of its contents. *State v. Leasia*, 410.

OPINION EVIDENCE OF AMOUNT OF DAMAGE.

9. Opinions as to the amount of damage suffered through a tort are not competent, the jury being the exclusive arbiters of that question.

Pacific Livestock Co. v. Murray, 103.

QUANTUM OF PROOF IN CIVIL CASES.

10. In a suit to enjoin the obstruction of a river, whereby the drainage of adjoining lands is retarded, the plaintiff has the burden of proof only to the extent of establishing his case by a preponderance of the evidence.

Krause v. Oregon Steel Co. 378.

See **EXECUTORS & ADMINISTRATORS**, 5, 6.

EXCUSABLE NEGLIGENCE.

Relief Against Order Entered Through — Remedy at Law. See **EQUITY**, 10.

EXCLUDING WITNESSES From the Courtroom. See **TRIAL**, 2.

EXECUTORS AND ADMINISTRATORS.**LIABILITY OF EXECUTOR FOR DEBT DUE TO DECEDENT.**

1. Under Section 1141, B. & C. Comp., providing that an executor of an estate shall be liable for any claim of the testator against him, "as for so much money in his hands," a debt of the executor of an estate on a note executed to the testator in his lifetime should be charged as so much money in the hands of the executor on the settlement of his final account, though the executor at the time of and after his appointment was unable to pay the note.

United Brethren v. Akin, 247.

WHAT IS A REASONABLE TIME TO PASS ON A CLAIM AGAINST AN ESTATE.

2. In the absence of some explanation, six months is a reasonable time for an executor to act on a claim presented against an estate, and the court should so declare.

Goltra v. Penland, 254.

PRESENTING CLAIM — EFFECT OF FAILURE TO ACT ON CLAIM.

3. Under B. & C. Comp. § 388, providing that no action shall be commenced against an executor until the claim has been presented and disallowed, and that if the executor does not pass on such claim within a reasonable time it will be deemed disallowed, the failure to act is equivalent to a rejection, and an instruction that a refusal to act amounts to a rejection is erroneous, there being a difference between failing to act and refusing to do so.

Goltra v. Penland, 254.

PRESENTING CLAIM — DETERMINATION OF REASONABLE TIME.

4. The determination of what is a reasonable time to pass upon a claim presented against an estate is a question for the court where the time of presentation is admitted and no explanation is given for the delay.

Goltra v. Penland, 254.

EVIDENCE OF PRESENTATION OF CLAIM.

5. Section 1161, B. & C. Comp., providing that no claim which shall have been rejected by the executor or administrator shall be allowed, except upon some competent or satisfactory evidence other than the testimony of the claimant, applies only to the trial on the merits of a rejected claim, and not to the preliminary question as to whether there was due presentation and disallowance within a reasonable time.

Goltra v. Penland, 254.

EVIDENCE TO SUPPORT REJECTED CLAIM AGAINST AN ESTATE.

6. Section 1161, B. & C. Comp., prohibiting the allowance of a rejected claim against an estate "except upon some competent or satisfactory evidence other

than the testimony of the claimant," does not mean that the other evidence aside from the testimony of the claimant must of itself be sufficient, but only that there must be other material and pertinent testimony supporting that given by claimant, sufficient to go to the jury, and on which it might find a verdict.

Goltra v. Penland, 254.

ACCOUNTING—FINAL ORDER REVIEWABLE IN EQUITY.

7. A decree approving and settling the final account of an administrator is such a final order as may be set aside in equity for fraud, though the property or fund has not been distributed nor the administrator discharged.

Froebrich v. Lane, 18.

ACCOUNTING—RELIEF IN EQUITY.

8. The right to relief in equity against a decree of the county court procured by fraud is not affected by Section 108, B. & C. Comp., providing for relief of a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, where the remedy therein provided has not been invoked.

Froebrich v. Lane, 18.

IDEM.

9. Where an administrator and heirs of the decedent entered into an agreement limiting the administrator's compensation, but notice of the hearing for settlement of his account was published in an obscure part of a paper in fine type, and the administrator concealed from the heirs the fact that his final account had been filed, and he therein charged more for his compensation than had been agreed, there was such fraud in procuring a decree settling the account as to authorize a court of equity to set it aside.

Froebrich v. Lane, 18.

LIMIT OF LIABILITY OF SURETIES ON EXECUTOR'S BOND.

10. The sureties on the bond of an executor are liable when and as he is with reference to the property coming into his hands, and a decree of the probate court that binds the principal will equally bind the sureties, unless for fraud or collusion.

United Brethren v. Akin, 247.

IDEM.

11. The sureties on an executor's bond, though they executed it without any knowledge of indebtedness by the executor to the decedent, or of the executor's insolvency, are still liable for the amount of such personal debt by the executor.

United Brethren v. Akin, 247.

EXECUTOR'S FRAUD THAT WILL RELEASE SURETIES.

12. Fraud that will release the sureties on an executor's official bond must be fraud in which the beneficiaries seeking to enforce the liability were themselves participants.

United Brethren v. Akin, 247.

EXECUTOR DE SON TORT—STATUTORY CHANGE OF COMMON-LAW RULE.

13. The effect of the enactment of Section 385 of B. & C. Comp. has been to so change the common-law rule as to the liability of an executor de son tort that he is now liable only to the legal representative of the deceased for the results of his interference.

Slate v. Henkle, 430.

SET-OFF IN FAVOR OF EXECUTOR DE SON TORT.

14. An heir who acted as administrator of his ancestor's estate under an appointment void because made in the wrong county, if he is afterward sued for conversion by the rightful administrator, may set-off such sums as he has paid out of the estate for its benefit.

Slate v. Henkle, 430.

EXECUTOR DE SON TORT—CROSS-BILL—ADEQUATE LAW REMEDY.

15. In an action for conversion by a legal representative of a decedent against an executor de son tort the latter may show as an off-set under the general issue such payments made by him officially as the lawful representative would have been bound to make, and he therefore has an adequate remedy at law, so that he cannot maintain a cross suit in equity to recover the value of his expenditures.

Slate v. Henkle, 430.

ACCOUNTING WITH EXECUTOR DE SON TORT — ITEMS DISALLOWED.

16. An administrator de son tort is not entitled on an accounting to an allowance for sums paid to a surety company for becoming surety on his bond, or for appraisers' and justices' services in taking acknowledgments, nor for services rendered by him or his attorneys, unless such services were rendered in the preservation of the property of the estate, and were conducive to its benefit.

Slate v. Henkle, 490.

IDEM.

17. On an accounting by an executor de son tort, he is not entitled to any fees as executor, and if the fees have been paid they must be returned, such executor being liable to the *de jure* executor therefor.

Slate v. Henkle, 430.

FARM LEASE.

Assignability of Without Landlord's Consent. See **LAND. & TEN.** 3.

FELLOW-SERVANTS.

Blacksmith in Relation to Helper of Another Mechanic in Another Part of the Shop. See **MASTER & SERVANT**, 1.

FENCES.

Lack of as Affecting Liability for Trespass by Sheep. See **ANIMALS**.

FINAL ACCOUNT of Executor.

Equitable Jurisdiction to Review — Surprise — Fraud. See **EQUITY**, 1.

FINAL ORDER. See **APPEAL**, 1, 6.**FINDINGS.**

Value of on Appeal in Equity Case. See **APPEAL**, 37.

By Supreme Court in Law Actions. See **APPEAL**, 88.

Judgment on Findings by Circuit Court. See **APPEAL**, 39.

FIRE INSURANCE.

Waiving Chattel Mortgage Clause in Policy. See **INSURANCE**, 1.

FIRES Set by Sparks From Locomotives. See **RAILROADS**, 1, 2.**FIXTURES.**

Right of Tenant to Remove After Ouster. See **LAND. & TEN.** 2.

FORCIBLE ENTRY AND DETAINER.**RIGHT OF APPEAL TO SUPREME COURT.**

Under Section 548 of B. & C. Comp., which provides that any party to a final order may appeal therefrom to the supreme court, either party to a judgment in a forcible entry and detainer action in the circuit court may appeal therefrom.

Dechenbach v. Rima, 500.

FORECLOSURE. See **MORTGAGES**.**FORMER ACQUITTAL OR CONVICTION.**

Waiving Right to Plead at Trial. See **CRIM. LAW**, 9.

FORMER ADJUDICATION. See **JUDGMENT**, 7-12.**FRANCHISES.**

Construction of Ordinance Granting Wharf Rights. See **MUNIC. CORP.** 4.

Rights of Mere Licensees in Public Streets. See **MUNIC. CORP.** 1, 2.

FRATERNAL INSURANCE. See **INSURANCE**, 3, 4.**FRAUD.**

As Ground of Equitable Intervention. See **EQUITY**, 3, 8.

Effect of in Ejectment Action. See **EJECTMENT**, 5.

FRAUDS, STATUTE OF. Same as **STATUTE OF FRAUDS**.

FRAUDULENT CONVEYANCES. Effect of on Legal Title. See **EQUITY**, 8.

GOVERNMENT LANDS. Same as **PUBLIC LANDS**.

HABEAS CORPUS.

GROUND OF REMEDY—SUFFICIENCY OF INFORMATION AFTER TRIAL.

1. The sufficiency of the charge on which a prisoner was tried cannot be inquired into on habeas corpus, since that matter was properly determinable by the trial court, and its decision can be reviewed only by appeal. *Ex parte Stacey*, 85.

JURISDICTION—SCOPE OF INQUIRY.

2. In a habeas corpus proceeding to inquire into the cause of an imprisonment the only question that can be considered is whether the proceedings under which the petitioner is held are absolutely void, and unless they are so, the writ must be denied. *Ex parte Stacey*, 85.

JURISDICTION—PRESUMPTION OF REGULARITY.

3. The return to a writ of habeas corpus being traversable in this State, it is presumed, in the absence of a showing to the contrary, that all legal proceedings therein referred to were regular. *Ex parte Stacey*, 85.

HARMLESS ERROR. See **APPEAL**, 26, 27, 28.

HELPER.

Blacksmith as Fellow-Servant of. See **MASTER & SERVANT**, 1.

HIGHWAYS.

CITY BRIDGE NOT A LEGAL COUNTY ROAD.

1. The streets of a city, in which term is included bridges connecting streets, are not included in the expression "a legal county road," used in the statute imposing a liability on counties for injuries resulting from defects in such roads (Laws 1893, p. 141, § 1, now Section 4781, B. & C. Comp.), even though the duty of caring for such streets or bridges may have been placed upon the county.

Schroeder v. Multnomah County, 92.

LEGISLATIVE ACT FIXING GRADE OF PUBLIC STREET.

2. An act of the legislature fixing the grade of a specified street as the one to which a certain bridge must conform determines the grade of the street where the bridge touches the bank as a straight line from the floor of the bridge to the grade of the specified street. *Mead v. Portland*, 1.

HOMESTEAD.

Difference in Heirship Quality Between Homestead and Timber Culture Claims. See **PUBLIC LANDS**, 1.

HOP CONTRACTS

Example of Mutual Contract of Purchase and Sale. See **CONTRACTS**, 1, 2, 3.

Enforceability of Contracts. See **SPEC. PERF.** 2, 3.

Fraudulent Attempt to Evade. See **SPEC. PERF.** 4.

HUSBAND AND WIFE.

When Relation Ends in Default Divorce Case. See **DIVORCE**.

IDEM SONANS. See **NAMES**.

IMPEACHMENT. See **WITNESSES**, 6.

IMPROPER ARGUMENT by Counsel.

Effect of Instruction to Disregard. See **APPEAL**, 30.

IMPUTED NEGLIGENCE of Parents Against Their Child. See **NEGLIGENCE**, 3.

INADVERTENCE.

Relief by Motion Against Order Entered by. See **EQUITY**, 10.

INCLINATION to Amorousness.

Result of Combining Opportunity With. See **ADULTERY**, 5.

INDEPENDENT CONTRACTOR.

Example of One Not an Independent Contractor. See **MAST. & SERV.** 5, 6.

INDIANS.**VALIDITY OF INDIAN MARRIAGES — LEGITIMACY OF ISSUE.**

1. A marriage between Indians according to tribal custom, followed by cohabitation as husband and wife, is a lawful union under the act of Congress of February 28, 1891 (26 Stat. U. S. 794, c. 383, § 5; 3 Fed. Stat. Ann. 501), and a child of such a relationship is legitimate for the purpose of determining the descent of land, even though the relationship may have commenced after an allotment of land in severalty under the act of Congress of February 8, 1887, commonly called the "Dawes Act": 24 Stat. U. S. 390, c. 119, § 6; 3 Fed. Stat. Ann. 496.

Kalyton v. Kalyton, 116.

EVIDENCE OF INDIAN MARRIAGE.

2. The evidence is satisfactory that the Indian woman Louise married the Indian man Joe Kalyton according to the custom of the Cayuse tribe, of which they were members; that the plaintiff Agnes Kalyton is the lawful issue of that union, though born after her father's death; and, further, that prior to her marriage with Joe Kalyton, Louise was divorced according to the custom of her tribe from all her former husbands.

Kalyton v. Kalyton, 116.

INDIAN ALLOTMENTS — EFFECT OF FIRST PATENT.

3. The first patent provided for by the act of Congress of March 3, 1885 (23 Stat. U. S. 340, c. 319, § 1), to be issued to Indian allottees on the Umatilla Indian Reservation is intended to be only a memorandum of the allotment and a declaration of the trust imposed on the United States.

Kalyton v. Kalyton, 116.

DESCENT OF INDIAN LAND AFTER FIRST PATENT.

4. Between the times of the issuance of the first and second patents to Indian allottees on the Umatilla Indian Reservation provided for by the act of Congress of March 3, 1885 (23 Stat. U. S. 340, c. 319, § 1), an allottee cannot voluntarily alienate the allotted land, or by any act affect the transmission of the title thereof in the course designated by the laws of Oregon. After the issuance of the first patent the land descends as by law provided upon the death of the allottee.

Kalyton v. Kalyton, 116.

SOURCE OF TITLE OF HEIRS OF ALLOTTEES.

5. *Quære.* Has an Indian allottee on the Umatilla Indian Reservation any estate in the land allotted until issuance of the second patent? And further, if such an allottee dies before the issuance of the second patent, do the heirs take by inheritance from the allottee or as donees of the United States?

Kalyton v. Kalyton, 116.

RIGHT OF STATE COURTS TO SETTLE HEIRSHIP OF INDIAN LANDS.

6. A suit to determine who are the heirs of an Indian allottee on the Umatilla Indian Reservation who died between the issuance of the two patents provided for by the act of Congress of March 3, 1885 (23 Stat. U. S. 340, c. 319, § 1), is not a proceeding to enforce the trust reserved by the United States, and is within the jurisdiction of the courts of Oregon. To such a suit the United States is not an indispensable party under the act of Congress of February 6, 1901: 31 Stat. U. S. 760; 3 Fed. Stat. Ann. 503, 504.

Kalyton v. Kalyton, 116.

INFANTS.

Negligence of Parents Not Imputable to. See **NEGLIGENCE**, 8.

INFORMATION.**HABEAS CORPUS — SUFFICIENCY OF INFORMATION AFTER TRIAL.**

The sufficiency of the charge on which a prisoner was tried cannot be in-

quired into on habeas corpus, since that matter was properly determinable by the trial court, and its decision can be reviewed only by appeal.

Ex parte Stacey, 85.

See ADULTERY — PERJURY.

INJUNCTION.

BREACH OF CONTRACT — REMEDY AT LAW.

Where a newspaper carrier route contract provided for arbitration on the termination of the same by either party, and the carrier could obtain adequate redress by the recovery of damages for breach thereof, he was not entitled to an injunction restraining the termination or breach of the contract.

Harlow v. Oregonian Pub. Co. 520.

INSOLVENCY

As a Reason to Decree Enforcement of Contract. See SPEC. PERF. 1.

INSTRUCTING JURY.

Questions Arising on Conflicting Testimony. See TRIAL, 3, 4, 5.

Propriety of Peremptory Directions. See TRIAL, 6.

Necessity of Finding as to Venue. See APPEAL, 32.

Requested Instructions — Necessity For. See APPEAL, 32.

Refusing Instructions Already Given. See TRIAL, 13.

Charge on Abstract Propositions is Error. See APPEAL, 31.

Construction of Charge on Effect of Oral Evidence. See TRIAL, 11.

INSURANCE.

FIRE INSURANCE — WAIVING CHATTEL MORTGAGE CLAUSE IN POLICY.

1. The action of an insurance company in issuing and delivering a policy covering certain chattels, on an oral application, and without any statement or inquiry as to the existence or effect of mortgages, and in accepting and retaining the premium, the insured being ignorant that the policy issued contained a clause making the policy void if the property insured was mortgaged, amounts to a waiver of the mortgage clause in the policy. *Allesina v. London Ins. Co.* 441.

ADJUSTMENT — VACATING A FRAUDULENT AWARD AT LAW.

2. An appraiser's award of a loss by fire cannot be impeached for fraud in a law action. *Fire Association v. Allesina*, 154.

WAIVER OF TERMS OF LIFE INSURANCE POLICY.

3. A waiver of a right necessarily involves on the part of the active power a knowledge of the right waived and of the facts relating to the matter: for instance, a premium or assessment on an insurance certificate having been remitted while the insured was suspended, and received at the head office after his death, the head officer, not being aware of his illness or death, cannot be said to have waived the suspension by keeping the assessment for a few weeks.

Miller v. Head Camp, 192.

FACTS NOT CONSTITUTING A WAIVER.

4. Defendant benefit society declared assessments during October and November, 1898, payable during the month following such levy. Insured never paid such assessments, and became ill January 10, 1899, and died on January 18th. Two days prior to his death the clerk of the local lodge, without knowledge that insured was seriously ill, issued receipts for such assessments, dating them as of January 5th, and sent the sums due therefor to defendant, without insured having certified that he was in good health. Proof of death was submitted to defendant April 5th, but it did not return the money so received until July 21st. The certificate provided that it should not be in force at any time when the member should be suspended from the order, and that, if he should not pay any assessment within the time prescribed, his certificate would become void, and so continue until he was reinstated, though a suspended member might be reinstated by making application within three months, certifying good health. *Held*, that

It was error to hold that there was a waiver of forfeiture, as a matter of law, as the defendant's general agent did not know of insured's illness and death.

Miller v. Head Camp, 192.

Joint Action by the Insured and the Insurance Company Under a Subrogation Agreement. See PARTIES.

INTEREST.

COMPUTING INTEREST WHEN RATE HAS BEEN CHANGED.

The rate of interest having been changed during the interest period of an implied contract, the amount due should be computed at the old rate to the time of the change, and thereafter at the new rate. *Thompson v. Hibbs*, 141.

As an Element of Damage in Cases of Conversion. See TROVER, 4.

IRREPARABLE INJURY. See WATERS, 1.

JUDGE.

Competency of as Witness in Case on Trial Before Him. See WITNESSES, 1.

JUDGMENT.

OPENING DEFAULT—TENDERING PROPOSED ANSWER.

1. An application to set aside an order of default, for whatever reason it may have been entered, must be supported by an answer showing a meritorious defense, a statement that such a defense exists is not sufficient.

Rgan v. North American Loan Co. 131.

APPLICATION TO OPEN DEFAULT—PRACTICE.

2. In considering an application to set aside a default order, especially where judgment has not been entered, and an answer disclosing a meritorious defense has been tendered, and the proceeding is apparently in good faith, the court should proceed with the idea of affording the parties a trial without unnecessary delay.

McFarlane v. McFarlane, 360.

DISCRETION AS TO OPENING DEFAULT.

3. The discretion accorded the trial court by B. & C. Comp. § 103, in allowing an answer or reply to be filed after the time limited by the Code, is a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve, and not to defeat, the ends of substantial justice.

McFarlane v. McFarlane, 360.

EXAMPLE OF ERROR IN DISCRETION.

4. After the entry of a decree for divorce, procured upon service by publication, plaintiff petitioned the court for a modification of the original decree and for alimony, attorneys' fees, allowances for support of children, and costs, in pursuance of which a citation to show cause was issued to defendant. Defendant appeared specially, and challenged the jurisdiction of the court, both as to person and subject-matter, and, on his contentions being overruled, refused to plead further, suffered default, and appealed. On appeal he secured a reversal in part and a remand to the trial court, where he promptly made application to be permitted to answer and with the motion tendered an answer stating a good defense. *Held* that, the proceedings on defendant's part having been taken in good faith, and in order to present his opposition to the proceedings in the most advantageous manner, the court should have permitted him to answer to the merits, although he was in part mistaken in his view of the law when he suffered default and took an appeal.

McFarlane v. McFarlane, 360.

VACATING JUDGMENT TAKEN CONTRARY TO STIPULATION.

5. A judgment rendered against a party in pursuance of but contrary to the terms of a stipulation is a proceeding taken against him by surprise within the meaning of Section 103, B. & C. Comp., authorizing the court to relieve a party from such a judgment.

Durham v. Commercial Nat. Bank, 385.

JURISDICTION OF EQUITY TO SET ASIDE FINAL PROBATE ORDER.

6. A court of equity may entertain a suit to set aside a final probate order, even though the estate has not been distributed thereunder, if fraud has intervened. Relief in such a case is proper notwithstanding Section 911, B. & C. Comp., giving county courts exclusive original jurisdiction to settle the accounts of executors, and Section 103, providing for the relief of a party against whom an order has been entered through inadvertence or neglect, provided this remedy has not been invoked. *Froebrich v. Lane*, 13.

JUDGMENT AS A BAR TO A SUBSEQUENT ACTION.

7. Where a street railroad brought suit against a bank to compel cancellation of certain of the street railroad bonds held by the bank as collateral, a decree in the bank's favor is no bar to a suit by a purchaser of the bonds from the bank, at a sale of the collateral, to enforce payment of the bonds, and to foreclose the mortgage given for their security. *Ruckman v. Union Railway Co.* 578.

IDEM.

8. In an action of ejectment the decree of the circuit court in a prior suit in equity to quiet title brought by the present plaintiff against the present defendant is not a bar, though in favor of the defendant, where it was reversed on appeal. A judgment or decree must be final to be a bar, that is it must be the final adjudication by the last court to which the case has been taken.

Trotter v. Town of Stayton, 301.

RES JUDICATA — MATTERS THAT MIGHT HAVE BEEN LITIGATED.

9. A judgment or decree rendered upon the merits is a bar to a subsequent proceeding between the same parties upon the same claim as to every matter that was or might have been litigated therein. *Ruckman v. Union Railway Co.* 578.

IDEM.

10. This is an instance of estoppel as to matters that might have been determined: A street railway company commenced a suit against a bank to compel the cancellation of certain of the company's bonds held by the bank as collateral, on the ground that they were never issued for value. Issue being joined, the suit was tried on the merits and a decree rendered against the company. At the time the suit was commenced the company might have pleaded payment theretofore made and estoppel by the conduct of the bank's officers, but did not plead or present either of these causes of suit. Afterward the bonds were sold by the bank, and the purchaser sued the company to enforce payment and foreclose the lien of the mortgage securing the bonds. To this suit the company answered by pleas of former payment and of estoppel by the conduct of the former owner of the bonds. *Held*, that the prior adjudication between the bank and the company was a bar to any further claim of either payment or estoppel, as both might have been pleaded by the company in its suit for cancellation.

Ruckman v. Union Railway Co. 578.

RES JUDICATA — MATTERS THAT WERE LITIGATED.

11. A suit or judgment between parties upon a different claim from one in question is an estoppel as to those matters only that were formerly actually determined.

Gentry v. Pacific Livestock Co. 233.

IDEM.

12. This rule is thus illustrated: Plaintiff sued to enjoin defendant from trespassing on or interfering with its possession of certain land, alleging that defendant went into possession as the agent and servant of plaintiff and afterwards wrongfully took possession in his own behalf. The trial court issued a preliminary injunction, but on trial found that, when defendant entered on the land, it was unsurveyed public land which he intended to enter as a homestead, and that, though the entry was by the advice of plaintiff, it was not under any contract with it, and that defendant did not hold possession for plaintiff's benefit, or

as its agent or employé. A decree was entered dismissing the suit and vacating the preliminary injunction. On appeal the court found that there was no error, and decreed that the decree below be affirmed, the temporary injunction dissolved, and the suit dismissed. The opinion rendered showed that the supreme court concluded that the defendant did enter into possession under the contract alleged in the complaint, but was of the opinion that this contract was illegal and void, and the decree below was affirmed on this ground. *Held* that, as affirmance of the trial court's decree did not involve approval of its conclusions of fact, the decree on appeal was not *res judicata* as to defendant's right to recover from plaintiff the value of hay cut from the premises by plaintiff during the pendency of the preliminary injunction. *Gentry v. Pacific Livestock Co.* 233.

RES JUDICATA — JUDGMENTS IN PARTICULAR PROCEEDINGS.

13. Events happening after the issues are joined are not competent evidence unless under supplemental pleadings: for instance, in an action of ejectment against a city, it was not error to exclude proceedings of the common council of the defendant, instituted for the purpose of condemning the land for public use, where such proceedings were not consummated, and the final ordinance attempting to appropriate the property in question was not passed, until after the issues in the case at bar had been joined, and no supplemental answer was filed.

Trotter v. Town of Stayton, 301.

EVIDENCE OF EXTENT OF ESTOPPEL BY JUDGMENT.

14. Though, generally speaking, the force of an estoppel by judgment may be said to reside in the decree and not in the reasons for it, still, if the decree relied upon is ambiguous, the opinion given in connection with it may be examined to determine just what was decided, in considering the effect of the decree as *res judicata*: for instance, a decree on appeal in a suit in equity that the decree of the lower court be affirmed, and that appellant is not entitled to the relief prayed for, and that the complaint is without merit and should be dismissed and a temporary injunction issued by the court below dissolved, is ambiguous, so as to justify examination of the opinion to determine what point was actually decided.

Gentry v. Pacific Livestock Co. 233.

JUDGMENT LIEN — DEFECTIVE DOCKETING.

15. Where a judgment did not become a lien on real property because the judgment docket did not show the date when it was entered therein, the filing of a transcript of such docket entry in another county did not create a lien on realty of the judgment debtor in such other county.

Wood v. Fisk, 276.

JURY.

DRAWING TRIAL JURIES IN MULTNOMAH COUNTY.

Under Section 976 of B. & C. Comp., providing for the drawing and summoning of jurors in Multnomah County, and Section 986, providing for filling the regular panel when it becomes depleted, the proper practice where several juries are required is to place in each box as they become available the names of jurors occupied in other trials when the selection in question commenced.

State v. Houghton, 110.

JUSTICES OF THE PEACE.

APPEAL FROM JUSTICE'S COURT — RETRIAL ON THE MERITS.

1. On appeal to the circuit court from a judgment of a justice of the peace rendered on an objection to costs, appellant is not entitled to a retrial of the case on its merits.

Lemmons v. Huber, 282.

WHEN AND FOR WHAT PURPOSES CIRCUIT COURT ACQUIRES JURISDICTION OF A CASE APPEALED FROM A JUSTICE'S COURT.

2. Under Section 2216, B. & C. Comp., providing that when a transcript from a justice's court is filed in a circuit court the appeal is to be deemed perfected, the circuit court acquires jurisdiction for all purposes with full power to supply

defective records when a transcript has been filed following a sufficient notice of appeal and a bond, though such transcript does not contain all that the statute requires.

Hager v. Knapp, 512.

APPEALS FROM JUSTICE'S COURTS—SUPPLYING DIMINISHED RECORDS.

3. The authority of circuit courts in Oregon to correct records in cases appealed from justice's courts, or to supply omissions from such records, not being controlled by statute, is found in the inherent power of superior courts to control inferior tribunals, and is discretionary.

Hager v. Knapp, 512.

DISCRETION IN SUPPLYING DIMINISHED RECORD.

4. Though a superior court may, on its own motion, award a certiorari to a justice's court to correct a transcript on appeal, when an inspection thereof discloses that important parts of the record have been omitted, the general rule is that it will not do so when by failure or neglect of the appellant the transcript is too imperfect to show affirmatively the grounds of error relied upon.

Hager v. Knapp, 512.

IDEM—CASE IN QUESTION.

5. Where a transcript on appeal from a justice disclosed that the original papers filed with the justice as exhibits were not attached, but no affidavit was filed by appellants showing that the omissions were injurious, or attempting to excuse their neglect, or disclosing when they first became aware of the fact, it was not an abuse of the circuit court's discretion to refuse a motion to permit an amendment of the record.

Hager v. Knapp, 512.

COSTS ON DISMISSING APPEAL FROM JUSTICE'S COURT.

6. After a circuit court has acquired jurisdiction of a case appealed from a justice's court it may give judgment for costs on dismissing the appeal.

Hager v. Knapp, 512.

APPEAL FROM TAXATION OF COSTS IN JUSTICE'S COURT.

7. *Quere.* Will appeal lie from an order of a justice of the peace settling a disputed cost bill? and do Sections 2200 and 2237, B. & C. Comp., make the practice as to taxing disbursements in the circuit courts applicable to justice's courts?

Lemmons v. Huber, 252.

LACHES.

Examples of Delay Not Amounting to. See EQUITY, 11, 12.

LANDLORD AND TENANT.

CREATION OF RELATION OF LANDLORD AND TENANT.

1. In view of Section 253, B. & C. Comp., which entitles a purchaser of realty at an execution sale to immediate possession, an agreement between such a purchaser and the former owner that the latter may retain possession at a stipulated rent, with the privilege of redeeming after the statutory period for so doing has expired, creates the relation of landlord and tenant between them.

Eldridge v. Hoefer, 239.

RIGHT OF TENANT TO REMOVE FIXTURES AFTER OUSTER.

2. A tenant who has been wrongfully ousted from his leased land may reënter within a reasonable time, which will be determined from the circumstances, and remove his improvements, not injuring the freehold.

Eldridge v. Hoefer, 239.

ASSIGNABILITY OF CROP LEASE WITHOUT LANDLORD'S CONSENT.

3. A lease of farming land carrying the use of divers implements of husbandry thereon owned by the lessor, the rent to be a proportion of the crop, is usually unassignable without the lessor's consent. Such an assignment will ordinarily work a forfeiture. In the present case the lease was evidently made on account of confidence in the skill of the lessee, though it did not stipulate particularly as to the manner of cultivating the crop, and must be considered a personal contract.

Meyer v. Livesley, 487.

LARCENY.**ELEMENTS OF LARCENY.**

1. Larceny consists of taking the personal property of another, without the owner's consent, accompanied by an intent to wholly deprive the owner thereof.

State v. Teller, 571.

EVIDENCE — LARCENY — EMPEZZLEMENT.

2. The evidence here does show any facts on which the court could properly instruct the jury as to the law where the missing property came lawfully into the lands of the defendant.

State v. Teller, 571.

LAWS OF OREGON.

For Compiled Laws see **STATUTES OF OREGON**.

For Uncompiled Laws see **SESSION LAWS OF OREGON**.

LEASE.

Assignability of Farm Lease Without Consent. See **LAND. & TEN.** 8.

LEGISLATIVE POWER.

Example of Permissible Delegation of Authority by Legislature to Board of Examiners. See **CONSTITUTIONAL LAW**, 1, 2.

To Establish Street Grades. See **MUNIC. CORP.** 3.

LICENSES.**RIGHT ACQUIRED BY ACTING UNDER A LICENSE.**

1. A grant by a municipality of permission to use a public street for a public utility, when acted upon confers a right that cannot be taken away without compensation.

Mead v. Portland, 1.

IDEM.

2. The ordinance in question here was a mere regulation of the construction of the wharves, and not a grant of any right or privilege to appropriate the street for wharfage purposes, and hence the owners took no rights because of expenditure of moneys in constructing the wharf, of which they could not be deprived by a change of grade of the street as an incident of the construction of an approach to a bridge.

Mead v. Portland, 1.

RIGHTS OF LICENSES IN PUBLIC STREET.

3. One occupying a public street under a permissive ordinance acquires no rights under the rule applicable to executed parcel licenses. *Mead v. Portland*, 1.

DUTY OF BOARD OF BARBER EXAMINERS IN ISSUING LICENSES.

4. Laws 1903, p. 31, § 9, authorizing the board of barber examiners to prescribe the qualifications of barbers within the State, does not confer on the board arbitrary power to issue or refuse licenses at its pleasure, but the board is impliedly required to exercise the power conferred by prescribing fair and reasonable qualifications appropriate to the calling intended to be regulated, operating generally and impartially upon all applicants similarly situated.

State v. Briggs, 366.

LIEN

Of Judgment Entered in Defective Docket. See **JUDGMENT**, 15.

LIFE INSURANCE. See **INSURANCE**, 2, 4.

LIMITATION OF ACTIONS.**ACCRUAL OF CAUSE OF ACTION.**

A cause of action accrues when the owner thereof becomes entitled to sue on it, and not before.

The Aurelia, 285.

See **MARITIME LIENS; TROVER**.

LIVE STOCK. Trespass by. See **ANIMALS**.

LOST WRITING. Secondary Evidence of Contents. See **EVIDENCE**, 8.

MANAGING AGENT.

Power of to Issue Notes for Principal. See CORPORATIONS, 3, 4, 5.

MANDAMUS.

TO COMPEL ARREST FOR MISDEMEANOR WITHOUT WARRANT.

1. Mandamus ought not to issue directing public officials to proceed without a warrant and arrest certain named persons who are alleged to be continuously committing misdemeanors not in the presence of any court or officer.

State ex rel. v. Williams, 814.

CONSTRUCTION OF WRIT DIRECTING ARREST.

2. A writ commanding a peace officer to arrest and prosecute particular persons said to be guilty of sundry misdemeanors will not be construed as a direction to file formal charges against them before making the arrests.

State ex rel. v. Williams, 814.

TO POLICE JUDGE TO ISSUE WARRANTS.

3. A mandamus to a police judge directing him to issue bench warrants for all violators of a certain city ordinance who have forfeited their bail or not appeared for trial, would be ineffectual because of the possible death of many, and because some have deposited money in lieu of bail, and therefore are not within the terms of the writ.

State ex rel. v. Williams, 814

COMMANDING ACT NOT ENJOINED BY LAW — TO ISSUE WARRANTS.

4. A mandamus ought not to issue directing a public officer to perform an act not enjoined upon him by law : as, for example, in view of a city charter providing for a clerk of the police court, who shall keep the seal of such court and affix it to the process thereof, it is not the duty of the judge to issue bench warrants, and he should not be commanded by mandamus to do so.

State ex rel. v. Williams, 814.

ADMISSIONS BY DEMURRER — LEGAL CONCLUSIONS.

5. Under the rule that a demurrer admits probative facts only, and not conclusions at all, an alternative writ of mandamus to a municipal judge to issue bench warrants, reciting merely that he neglects to issue them "as required by law," does not, as is necessary, show that it is incumbent on such judge to issue bench warrants, but states merely a legal conclusion.

State ex rel. v. Williams, 814.

MISJOINDER OF CAUSES

6. A writ of mandamus may properly be directed to several officers directing each to perform one or more of several acts enjoined by law, the series of acts so commanded being necessary to secure to relator some legal right.

State ex rel v. Williams, 814.

DIRECTING MAYOR TO ORDER CHIEF OF POLICE TO OBEY LAWS.

7. Though it is the duty of the mayor or executive board of a city, on receipt of satisfactory information, to direct the chief of police to enter gambling houses and arrest persons there found offending against the law, yet, it being made the duty of a police officer to inform against and prosecute persons whom he has reasonable cause to believe guilty of gambling, mandamus ought not to issue to the mayor to order the chief of police to prosecute gamblers, nor ought such writ to issue to the chief of police directing him to obey such order, for, it being the duty of the chief to suppress gambling, he does not need any special orders, and a writ to him alone directing the performance of his duty will be sufficient.

State ex rel v. Williams, 814.

ORDERS OF SUPERIOR AS PROTECTION TO INFERIOR OFFICER.

8. An order by a superior to an inferior to perform or do an unlawful act or not to perform a duty required by law is void and affords no protection to the person receiving it. Thus, mandamus to a chief of police to prosecute gamblers will not be refused on the principle that an officer cannot be compelled to do what his superior officer has lawfully commanded him not to do, where the

mayor and the chief of police have entered into an unlawful conspiracy not to prosecute such offenders. *State ex rel v. Williams*, 314.

EFFECT OF SUSTAINING DEMURRER FOR MISJOINDER OF CAUSES.

9. The effect of sustaining a demurrer to a complaint for a misjoinder of several causes of complaint is to entirely obliterate the pleading, and the party must plead over or be nonsuited. *State ex rel v. Williams*, 314.

MANDATE.

Need of Filing Before Another Trial. See TRIAL, 1.

MAP. See RATIFICATION, 2.

MARITIME LIENS.

RIGHT TO SUE — LIMITATIONS.

Under Section 5722, B. & C. Comp., declaring that actions to enforce liens on boats constructed in this State shall be commenced within a stated time after "the cause of action shall have accrued," the right to sue is complete when the material or labor is to be paid for, and not when it is furnished. *The Aurelia*, 285.

MARKETABLE TITLE.

Nature of Title Contracted to be Sold. See VEND. & PUR. 11.

Quality of Marketable Title. See VEND. & PUR. 12, 13, 14.

MARRIAGE.

SUFFICIENCY OF EVIDENCE OF EYEWITNESS.

1. The evidence of eyewitnesses to the ceremony is sufficient in both civil and criminal cases to prove a marriage. *State v. Eggleston*, 346.

PRESUMPTION AS TO CONTINUANCE OF MARRIAGE.

2. A marriage shown to have existed is presumed to continue until the contrary appears. *State v. Eggleston*, 346.

Validity of Indian Union — Legitimacy of Issue. See INDIANS, 1.

MASTER AND SERVANT.

BLACKSMITH AS FELLOW-SERVANT WITH A HELPER.

1. A blacksmith merely working in a machine shop for wages, and not intrusted with any duty toward other employes, is a fellow-servant with a helper of another blacksmith at another forge. *Duff v. Willamette Steel Works*, 479.

NEED OF PLEADING NEGLIGENCE OF FELLOW-SERVANT.

2. Under Section 72 of B. & C. Comp., requiring an answer to contain a general or specific denial of every material allegation controverted by defendant and a statement of any new matter constituting a defense or counterclaim, a defense that an injury complained of was the result of the negligence of a fellow-servant, is new matter which defendant must plead, in order to render the same available. *Duff v. Willamette Steel Works*, 479.

EFFECT OF NEGLIGENCE OF FELLOW-SERVANT—NONSUIT.

3. If it clearly appears from the testimony offered on behalf of the plaintiff in a personal injury case that the injury resulted from the negligence of a fellow-servant the court should enter a nonsuit, though that defense is not pleaded, since it is thereby apparent that plaintiff has not a cause of action.

Duff v. Willamette Steel Works, 479.

INSTRUCTION ON ISSUES NOT MADE BY PLEADINGS.

4. In an action for personal injuries, an instruction is erroneous which permits a verdict for defendant, if the injury resulted from the negligence of a fellow-servant, where that defense is not pleaded. *Duff v. Willamette Steel Works*, 479.

EXAMPLE OF ONE NOT AN INDEPENDENT CONTRACTOR.

5. In an action for the death of a child while at play, resulting from the fall of timbers alleged to have been negligently piled in the street near the home of

the deceased, the mere fact that the defendant, as owner of the timbers, paid a teamster to haul them to the premises, is insufficient to constitute the teamster an independent contractor, so as to relieve the defendant from liability for the manner in which the timbers were piled. *Macdonald v. O'Reilly*, 589.

LIABILITY OF INDEPENDENT CONTRACTOR.

6. In an action for the death of a child from the fall of timbers alleged to have been negligently piled in the street, where it appeared that the timbers were for the use of independent contractors, who were engaged at the time of the accident in preparing to begin work, but that the defendant, as owner of the premises and the timbers, had them hauled there, a charge that if the accident happened from the unsafe condition in which the timbers were left on the ground by defendant, and before possession thereof was taken by the contractors, the defendant would be responsible, but if the contractors had taken control of the timbers, and had negligently put them in an unsafe condition, or if they were responsible for their being in such condition, they, and not the defendant, would be liable for the accident, was a correct statement of the law. *Macdonald v. O'Reilly*, 589.

MEASURE OF DAMAGES.

Trover — Value of Use Not an Element. See TROVER, 3.

Ejectment — Inconvenience and Business Loss. See EJECTMENT, 6.

For Changed or Delayed Cipher Dispatches. See TELEGRAPHS, 3.

Trespass on Grazing Land by Animals. See DAMAGES, 5.

MINES AND MINERALS.

LOCATION OF CLAIM — MARKING BOUNDARIES.

1. In marking a mining location under Sections 3975 and 3976, B. & C. Comp., a failure to place monuments at the center ends of the ground claimed is a fatal omission, as is a neglect to attach to the recorded copy of the location notice an affidavit that the required improvement work has been done.

Wright v. Lyons, 167.

MARKING LOCATIONS — CONFLICT OF STATE AND FEDERAL LAWS.

2. Sections 3975 and 3976, B. & C. Comp., requiring locators of a lode claim to establish the center end posts or monuments of the claim in a particular manner, and to attach to the copy of notice of location filed with the clerk of the county wherein the claim is situated an affidavit of proof of the work required to be done by section 3977, as conditions precedent to the establishment of a valid claim, are not in conflict with Section 2324, Rev. Stat. U. S., requiring that the location of a claim shall be distinctly marked on the ground, since the latter section does not specify how the marking shall be done, while the former supplies the omitted information.

Wright v. Lyons, 167.

MISCONDUCT OF COUNSEL.

Effect of Prompt Disapproval by Judge. See APPEAL, 30.

MISTAKE.

Effect of on Right to Perfect an Appeal. See APPEAL, 12.

Relief Against — Remedy by Motion. See EQUITY, 10.

Effect of on Right to Recover Money Paid. See PAYMENT, 1, 2.

MITIGATION OF DAMAGES.

Right to Show Trespass by Others than Defendant. See DAMAGES, 4.

MORRISON-STREET BRIDGE in Portland.

Defects in — Liability of Multnomah County for Damages. See COUNTIES, 1, 3.

MORTGAGES.

RIGHT TO CANCELLATION OF USURIOUS MORTGAGE.

1. Where the payments made on an usurious loan, applied at the legal rate

of interest, amount to the sum justly due, the borrower is entitled to have the payments properly applied and the debt and the mortgage securing it canceled.

Egan v. North American Loan Co. 131.

LIABILITY OF GRANTEE OF MORTGAGED LAND—USURY.

2. A grantee of real property subject to an usurious mortgage who did not assume the debt, but merely took the land subject to it, may plead usury against the mortgagee as to all payments that have been made on the debt.

Egan v. North American Loan Co. 131.

ENFORCING STRICT FORECLOSURE.

3. The remedy of strict foreclosure is a harsh one and will be enforced only in the sound discretion of the court, depending upon the varying conditions presented.

Flanagan Estate v. Great Cent. Land Co. 335.

STRICT FORECLOSURE NOT AFFECTED BY STATUTE.

4. Section 423, B. & C. Comp., providing for the foreclosure of liens and the sale of the property subject thereto, applies only to security debts.

Flanagan Estate v. Great Cent. Land Co. 335.

STRICT FORECLOSURE—REASONABLE TIME FOR PAYMENT.

5. Parties seeking strict foreclosure must allow a reasonable time to make any delinquent payments.

Flanagan Estate v. Great Cent. Land Co. 335.

MULTNOMAH COUNTY.

Special Rules for Drawing Trial Juries in. See JURY.

Liability for Defects in Morrison-street Bridge. See BRIDGES, 1, 2, 3.

MUNICIPAL CHARTERS. Same as CHARTERS OF CITIES.

MUNICIPAL CORPORATIONS.

RIGHTS OF LICENSEES IN PUBLIC STREET.

1. One occupying a public street under a permissive ordinance acquires no rights under the rule applicable to executed parcel licenses. *Mead v. Portland*, 1.

RIGHT ACQUIRED BY ACCEPTANCE OF PUBLIC FRANCHISE.

2. Where a municipal corporation, in pursuance of legislative authority, grants a privilege or right to use or occupy a public street for a public purpose, and the grantee, in reliance on the grant, expends money in developing the grant, he acquires a property interest or right which can be taken away only under the power of eminent domain, and after proper compensation.

Mead v. Portland, 1.

LEGISLATIVE ESTABLISHMENT OF STREET GRADE.

3. A legislative franchise to bridge a river flowing through a city, providing that one of the approaches must conform to the grade of a certain street running at right angles to the direction of the bridge, establishes the grade of the selected street between the end of the bridge and the cross street as a straight line. In other words, such act is a change of the grade of the selected street between the cross street and the water's edge.

Mead v. Portland, 1.

CONSTRUCTION OF ORDINANCE GRANTING A PUBLIC FRANCHISE.

4. The owners of lots abutting on a river running north and south, which lots were divided by a street running east and west, terminating at the river, desiring to build wharves, an ordinance was passed, entitled "An ordinance authorizing the construction of a wharf in front of and opposite" the lots referred to. The ordinance provided that the owners of the lots were authorized and permitted to construct a wharf on and in front of the lots, and that the owners should construct a pontoon suitable for the landing of small boats, with steps leading from the pontoon to the lower floor of the wharf. It was provided that the upper story of the wharf should not extend beyond the lines of the block southwardly, save for a passageway fifteen feet in width over the north side of the street, and that the whole passageway and a portion of the wharf extending on to the street

should be subject to regulation and control by the municipality. *Held*, that the ordinance was a mere regulation of the construction of the wharves, and not a grant of any right or privilege to appropriate the street for wharfage purposes, and hence the owners took no rights because of expenditure of moneys in constructing the wharf, of which they could not be deprived by a change of grade of the street as an incident of the construction of an approach to a bridge.

Mead v. Portland, 1.

EVIDENCE OF ADVERSE POSSESSION OF STREETS.

5. The evidence adduced shows that part of the land in dispute has been adversely used by the defendant for more than ten years, whereby plaintiff's title has been extinguished.

Sheridan v. Empire City, 296.

RATIFICATION OF PLAT BY PAYING TAXES.

6. The mere voluntary payment of taxes and street assessments levied on certain land is not evidence of a ratification of the plat of such land with reference to which the levies and assessments were made.

Sheridan v. Empire City, 296.

SILENCE NOT RATIFICATION.

7. A lot owner cannot be said to have ratified the action of the municipality in establishing certain boundaries, by merely keeping silent until his lots were intruded upon, no matter how long the silence.

Sheridan v. Empire City, 296.

MUTUALITY

Of Hop Contracts on Condition of Quality. See CONTRACTS, 1, 2, 3.

NAMES.

SIGNATURES TO DEED—IDEM SONANS.

The fact that the heirs of a man named "Clark" signed as "Clarke" a deed to property inherited from him is a mere unimportant irregularity in the chain of title.

Allschul v. Casey, 182.

NAVIGABLE WATERS.

OWNERSHIP OF LAND BETWEEN HIGH AND LOW-WATER MARK.

Land between ordinary high and low-water mark along a tidal stream belongs to the State, and *prima facie* its deed carries the title.

Muckle v. Good, 230.

NEGLIGENCE.

DUTY OF OCCUPANT OF DANGEROUS PREMISES.

1. An occupant of premises on which there are dangerous places—like an unguarded elevator shaft, for instance—who invites others to enter, owes them the duty of warning as to such places.

Massey v. Seller, 267.

AGE OF DISCRETION IN CHILD.

2. A child four and a half years old has not as a matter of law sufficient judgment or intelligence to be capable of negligence.

Macdonald v. O'Reilly, 589.

IMPUTING NEGLIGENCE OF ONE PARENT TO THE OTHER.

3. In view of Sections 512 and 513, B. & C. Comp., under which the parents share equally and independently of each other in the care and custody of their children, neither is the agent of the other, nor can the negligence of one be imputed to the other, in actions for damages resulting from injuring or killing their child.

Macdonald v. O'Reilly, 589.

CONTRIBUTORY NEGLIGENCE.

4. Where one who was in a strange building saw a dark place in a corner, and walked into it without determining what was there, and was injured by falling down an open elevator shaft, he was guilty of contributory negligence, precluding recovery.

Massey v. Seller, 267.

WHEN NEGLIGENCE IS QUESTION FOR JURY.

5. Where different inferences may reasonably be deduced from the testimony the question of negligence should be submitted; but not where only one inference can be reasonably deduced. In the latter instance it is the duty of the court to so declare, and the jury may be peremptorily instructed accordingly.

Wolf v. City Railway Co. 446.

IDEM.

6. Where there is no dispute as to the facts and the deduction therefrom is very clear, the court should state to the jury whether the facts show either negligence or contributory negligence.

Massey v. Seller, 267.

Need of Pleading Negligence of Fellow-Servant. See **MAST. & SERV.** 2.

Effect of Showing Negligence of Fellow-Servant. See **MAST. & SERV.** 3.

NEGOTIABLE INSTRUMENTS. Same as **BILLS & NOTES.**

NERVOUS SHOCK.

Damage for Under Plea of General Damage. See **DAMAGES**, 1, 2.

NEW TRIAL.**POWER OF COURT TO REQUIRE REMISSION OF PART OF VERDICT.**

1. In an action for personal injuries, the court has power to order a remission of a part of the damages awarded by the verdict as a condition of overruling a motion for a new trial.

Adcock v. Oregon Railroad Co. 173.

POWER TO REMIT PART OF PREJUDICED OR PASSIONATE VERDICT.

2. Where it clearly appears that the jury in a damage action were influenced by passion or prejudice, the error cannot be cured by remitting a part of the verdict, but a new trial must be granted.

Adcock v. Oregon Railroad Co. 173

Time to Present Plea of Former Acquittal. See **CRIM. LAW**, 9.

NONSUIT.

Effect of Showing Want of Cause of Action Though Such Defense Has Not Been Pleaded. See **TRIAL**, 8.

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 Williams v. Culver, 39 Or. 341, applied, 259.
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PARENTS.

Negligence of One Parent Not Imputable to the Other. See NEGLIGENCE, 3.

PAROL

Lease Void Because Not Written. See STAT. OF FRAUDS, 1.

Agreement to Make Lease — Validity of. See SPEC. PERF. 6.

PAROL EVIDENCE of Contents of Lost Letter. See EVIDENCE, 8.

PARTIES.

FIRE INSURANCE — SUBROGATION — JOINT ACTION AT LAW.

Where an insurer pays a loss under a policy of fire insurance in a less amount than the insured's loss by fire, and takes a subrogation assignment for the sum

paid, the insurer and the insured, under B. & C. Comp. §§ 27 and 393, requiring actions at law and suits in equity to be prosecuted in the name of the real party in interest, may jointly maintain an action at law against a wrongdoer who negligently caused the loss. *Fireman's Ins. Co. v. Oregon Railroad Co.* 53.

Names of Parties in Attachment Certificate. See ATTACHMENT, 1.

Suing Foreign Receiver Here Without Permission. See RECEIVERS, 2.

When Defect of Parties May be First Urged. See APPEAL, 8.

PARTNERSHIP.

DISSOLUTION — INCREASE OF PLANT AS PROFITS.

Where plaintiff and defendant entered into a partnership agreement — plaintiff to contribute the entire plant, and defendant, out of his share of the surplus earnings, to repay to him one half the expenditure therefor — the increase in the value of the plant is to be considered part of the profits, on a dissolution before the stipulated time, owing to their disagreement, as to which they were equally at fault. *Woldenberg v. Berg*, 291.

PATENT.

Presumptive Effect of Government Patent. See PUBLIC LANDS, 4.

PAYMENT.

RECOVERING MONEY PAID UNDER MISTAKE OF FACT.

1. Money honestly paid in ignorance or forgetfulness of the facts, or under a clearly proven, genuine mistake as to the truth, may be recovered.

Scott v. Ford, 531.

RECOVERING MONEY PAID UNDER MISTAKE OF LAW OR ERROR OF FACT.

2. Money paid under a mistake of law, with knowledge of all the facts, no deceit or undue importunity intervening, cannot be recovered; but if paid under an error of fact, not arising from the intentional neglect of the party to inquire, even if accompanied by a mistake as to the law or ignorance of it, a recovery may be had.

Scott v. Ford, 531.

IDEM.

3. In an action to recover money paid by executors to one whom they supposed entitled to receive it under the will, a finding that the money was paid to defendant under the belief that she was entitled to it as a child of her deceased father under the will, does not sustain a judgment of recovery, as it discloses only a mistake of law unaffected by any act of the defendant.

Scott v. Ford, 531.

IDEM.

4. In such a case a finding that the evidence does not show whether plaintiffs had any belief or knowledge as to whether defendant's father was alive at the time the will was executed or at the time of testator's death, does not support a judgment for plaintiff on the ground of an error of fact, for it does not show that the plaintiffs were mistaken as to the truth.

Scott v. Ford, 531.

PERJURY.

INFORMATION — CHARGING AUTHORITY TO ADMINISTER OATH.

1. Under B. & C. Comp. § 1321, providing that in an information for perjury it is sufficient to set forth in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, an information stating that the person before whom the statements in question were made was "empowered and authorized by law to take depositions and evidence, and to administer oaths to witnesses in said county, and particularly to do said things and to so act with reference to said W. in said cause," sufficiently states that the clerk had authority to administer oaths in the proceeding in which the perjury is assigned.

State v. Woolridge, 389.

INFORMATION — CHARGING ADMINISTERING OF THE OATH.

2. A statement in an information for perjury that defendant appeared before the clerk of the court to have her deposition taken in a certain cause, and was then and there duly sworn in the said cause, sufficiently alleges that an oath was administered to the defendant. *State v. Woolridge, 889.*

CHARGING MATERIALITY OF TESTIMONY.

8. In an information for perjury charged to have been committed by denying on oath in a deposition certain statements attributed to her in a newspaper article, a charge that defendant, being sworn, did, in a matter material to a civil cause growing out of the publication of her alleged statements, falsely and corruptly swear, sufficiently shows the materiality of her evidence. *State v. Woolridge, 889.*

PERSONAL INJURIES.

Usual Effects of Injury — Pleadings and Proofs. See DAMAGES, 1.

Inference From Changed Physical Condition. See DAMAGES, 3.

Power of Trial Court to Remit Part of Verdict. See NEW TRIAL.

PHOTOGRAPH as Evidence — Harmless Error. See APPEAL, 27.

PHRASES. Same as WORDS & PHRASES.

PLAT.

Effect of Paying Taxes on Platted Land. See RATIFICATION, 2.

PLEADING.

AMENDING COMPLAINT — DISCRETION — EXAMPLE.

1. The use of the word "amend" in reference to a pleading necessarily implies that there is already something to correct or enlarge upon, and the practice in permitting amendments is quite liberal in this State, unless the pleading is utterly wanting in essential allegations: for example, a complaint in a suit between sureties for contribution which contained the title of the court, and the names of all the parties, an allegation of the making of a note by the plaintiff, the defendants and another, and the death of the latter, a statement of the payment of such note by plaintiff, that only a part of it had been repaid, and the proportionate liability of each defendant, though defective in that it did not show for whose benefit such note was made, or that either the plaintiff or any of the defendants were sureties thereon, still contained enough of a cause of suit to justify an amendment, in the discretion of the trial court. *Thompson v. Hibbs, 141.*

DISCRETION OF COURT AS TO AMENDMENTS OF PLEADINGS.

2. Granting permission to amend pleadings is a matter of discretion with the trial judge, which was well exercised in this instance. *Baines v. Coos Bay Nav. Co. 307.*

EFFECT OF ADMISSIONS IN PLEADINGS.

8. Admissions in the pleadings amount to findings of fact as to the matters admitted. *Miller v. Head Camp, 192.*

ADMISSIONS BY DEMURRER — LEGAL CONCLUSIONS.

4. Under the rule that a demurrer admits probative facts only, and not conclusions at all, an alternative writ of mandamus to a municipal judge to issue bench warrants, reciting merely that he neglects to issue them "as required by law," does not, as is necessary, show that it is incumbent on such judge to issue bench warrants, but states only a legal conclusion. *State ex rel. v. Williams, 314.*

ACTION OR SUIT — EFFECT OF ALLEGATIONS.

5. A complaint containing allegations that show an equitable cause only is still in equity, though it may have been called an action — the nature of the proceeding is determined by the statements in the pleading and not by what it may be called by the pleader. *Thompson v. Hibbs, 141.*

ALLEGATIONS AND PROOFS—ISSUES IN PLEADINGS.

6. Cases must be tried and decided on the issues made by the pleadings. Courts cannot undertake to pass on matters not thus involved.

Adcock v. Oregon Railroad Co. 173; *Blackburn v. Lewis*, 422.

IDEM.

7. In a suit to remove a cloud on title, plaintiff not having claimed in the pleadings for improvements placed on the land, he is not entitled to recover for such improvements on his title being declared void. *Blackburn v. Lewis*, 422.

See **MAST. & SERV.** 2, 4; **REPLEVIN**, 1.

PORTLAND.

Charter of City of Portland. Same as **CHARTERS OF CITIES**.

POSTPONEMENT of Trial. Same as **CONTINUANCE**.

PRACTICE IN SUPREME COURT.**PREPONDERANCE of Proof.**

Degree of Proof Required of Plaintiff in Civil Cases. See **EVIDENCE**, 10.

PRESUMPTION

Of Regularity of Proceedings—Habeas Corpus. See **HABEAS CORPUS**, 3.

As to Continuance of Existing Marriage. See **MARRIAGE**, 2.

As to When Objection Was Made. See **APPEAL**, 21.

As to Power of Corporate Grantor to Convey. See **CORPORATIONS**, 6.

On Appeal That Trial Court Acted Correctly. See **APPEAL**, 22.

Of Negligence From Starting of Fire. See **RAILROADS**, 1, 2.

Of Knowledge of Corporate Officers of the Power and Authority of the Corporate Agents and Employés. See **CORPORATIONS**, 2.

Of Powers of General Corporate Manager. See **CORPORATIONS**, 3, 4, 5.

That Public Board Acted Within Its Powers. See **APPEAL**, 24.

As to Effect of Error Appearing of Record. See **APPEAL**, 25.

Of Continued Infirmary of Witness. See **DEPOSITIONS**, 3.

Of Continuance of Existing Conditions. See **EVIDENCE**, 1, 2.

PRINCIPAL AND AGENT.**ADMISSIONS OUTSIDE SCOPE OF AUTHORITY.**

1. The statements of an agent, to be binding upon the principal, must have been made on a subject within the scope of the agent's authority, and at a time when that subject was being considered: for instance, in an action for conversion of sheep by one caring for them on shares, declarations of a person who delivered wool for defendant to a warehouseman as to the ownership of the sheep from which the wool was clipped were outside the scope of such person's authority as agent, and were inadmissible, he being employed simply to haul the wool to the warehouse. *Goltra v. Penland*, 254.

SALE OF SAMPLES BY TRAVELING SALESMAN.

2. A travelling salesman has no implied authority from the nature of his employment to sell the samples intrusted to him by his employer.

Hibbard v. Stein, 507.

CONSTRUCTION OF CONTRACT WITH TRAVELING SALESMAN AS TO DISPOSITION OF SAMPLES—TITLE OF PURCHASER.

3. A contract employing a travelling salesman provided that the salesman should return all the samples to his employer, or sell them under the instructions of the house, and account for the same in cash or an itemized statement, naming the firm they are to be charged to, and required the salesman to pay cash for all samples unaccounted for at the end of the year or at the termination of the contract. The contract also had attached a schedule, which provided that samples were charged as cash, and must be paid for by salesmen, unless returned

or their sale properly accounted for. *Held*, that such contract did not authorize the salesman to sell his samples except in pursuance of express instructions from his employer, and that a sale made without such instructions conferred no title on the purchaser. *Hibbard v. Stein*, 507.

PRINCIPAL AND SURETY.

RIGHTS AND REMEDIES OF SURETIES AGAINST COSURETY.

1. A complaint in a suit between sureties for contribution which contained the title of the court, and the names of all the parties, an allegation of the making of a note by the plaintiff, the defendants and another, and the death of the latter, a statement of the payment of such note by plaintiff, that only a part of it had been repaid, and the proportionate liability of each defendant, though defective in that it did not show for whose benefit such note was made, or that either the plaintiff or any of the defendants were sureties thereon, still contained enough of a cause of suit to justify an amendment, in the discretion of the trial court. *Thompson v. Hibbs*, 141.

IDEM.

2. Where a surety commenced a proceeding for contribution jointly against two of his three cosureties, the suit was necessarily one in equity, since at law he would be required to sue each surety separately for his aliquot part of the loss. *Thompson v. Hibbs*, 141.

PROBATE COURT.

Review of Final Order of by Equity Court. See EQUITY, 1, 2.

PROMISSORY NOTES. Same as BILLS & NOTES.

PROOF.

Degree of Required of Plaintiff in Civil Cases. See EVIDENCE, 10.

PROSTITUTION.

Competency of Evidence That Female Participant in Proceedings Was Reputed to be a Prostitute. See ADULTERY, 2.

PUBLIC LANDS.

DEVISABILITY OF TIMBER CULTURE CLAIMS—STATUTES.

1. An entryman under the timber culture act of the United States has no devisable interest in the entered land until the issuance of the final certificate. If he dies in the mean time, his heirs, upon certain conditions, may obtain the land, but they will take as donees of the government by purchase, and not through the original settler by descent. There is a difference in this respect between the homestead and timber culture acts. *Kelsay v. Eaton*, 70.

PRIMA FACIE EVIDENCE OF LOCATION OF PUBLIC GRANT.

2. On an issue as to the exterior limits of a land grant a certified copy of a diagram from the office of the Secretary of the Interior, showing the primary limits of the grant, establishes *prima facie* the limits as so shown, as it comes from an office the chief official of which was charged by law with the duty of adjusting the grant, and appears on its face to have been made with reference to proper legal subdivisions. *Eastern Oregon Land Co. v. Andrews*, 203.

IDEM.

3. On an issue as to the exterior limits of a wagon road land grant, the *prima facie* case made by the production of a diagram from the office of the Secretary of the Interior, showing the primary limits of the grant, is not overcome by introducing a plat from the office of the Secretary of the State in which the land is situated, certified by the Governor as correctly showing the location of the road, and the testimony of a surveyor that the land in question was outside the limits of the grant as measured from the line of construction shown on the state map, for no law required the filing of any map with any state official, nor does it appear that such map was the basis of the adjustment of the grant by the United States. *Eastern Oregon Land Co. v. Andrews*, 203.

EVIDENCE DISPUTING GOVERNMENT PATENT.

4. A government patent is presumptive evidence that the land department of the United States had authority to issue it and that such power was rightfully exercised, and to overcome this presumption clear and convincing proof is required. *Eastern Oregon Land Co. v. Andrews*, 203.

QUANTUM OF PROOF in Civil Cases. See **EVIDENCE**, 10.

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When Negligence Should be Stated by Judge. See **NEGLIGENCE**, 5, 6.

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Superiority of Right Between Paper Title and Possession. See **EJECTMENT**, 1.

Power of General Manager to Issue Notes. See **CORPORATIONS**, 3, 4, 5.

QUESTION NOT RAISED IN TRIAL COURT. See **APPEAL**, 7.

QUIETING TITLE.**NEED OF ADVERSE POSSESSION.**

1. A naked claim of title by adverse possession not based on color of title, or accompanied by actual possession, will not support a suit to quiet title, or require a showing of the defendant's claim. *Muckle v. Good*, 230.

RIGHT TO SET ASIDE FRAUDULENT DEED.

2. While the fact that a certain conveyance of real estate was fraudulent as to the grantor's creditors is available as a defense at law, such defense would not relieve the land from the fraudulent deed as a cloud on the title, and the defendant in the action at law is entitled to file a complaint in equity in the nature of a cross-bill, as authorized by B. & C. Comp. § 391, to have such conveyance vacated on that ground, the law remedy being incomplete and inefficient in comparison with the equitable one. *Wood v. Fisk*, 276.

RAILROADS.**DUTY TO PREVENT ESCAPE OF SPARKS AND FIRE.**

1. It is the duty of a railroad company to use reasonable care to procure the most approved appliances in practical use to prevent the escape of fire from its engines; and when such care has been used in endeavoring to obtain such appliances, the duty has been performed. *Anderson v. Oregon Railroad Co.* 211.

PRESUMPTION OF NEGLIGENCE FROM OCCURRENCE OF FIRE.

2. In an action for damages caused by a fire started by locomotive sparks, a *prima facie* case is made by showing that the fire started through sparks thrown out by a passing engine and communicated to plaintiff's property, resulting in its injury. *Anderson v. Oregon Railroad Co.* 211.

COMPETENT EVIDENCE IN SUCH CASES.

3. In an action for damages by fire set out by a railroad locomotive, evidence that sparks escaped from the engines in large showers, or that sparks of unusual size were emitted and carried to a great height, or that an unusual volume was emitted, is admissible, though not necessary to showing a cause of action. *Anderson v. Oregon Railroad Co.* 211.

RATIFICATION.**SILENCE NOT THE EQUIVALENT OF ACTION.**

1. One not under obligation to act with reference to a claim made by others is not bound by their statements, nor can his silence be considered as an admission against him. *Sheridan v. Empire City*, 296.

RATIFICATION OF PLAT BY PAYING TAXES.

2. The mere voluntary payment of taxes and street assessments levied on certain land is not evidence of a ratification of the plat of such land with reference to which the levies and assessments were made. *Sheridan v. Empire City*, 296.

REAL PARTY IN INTEREST.

Insurer Holding Under Subrogation Agreement. See **PARTIES**.

RECEIVERS.

RIGHTS OF FOREIGN RECEIVER.

1. The comity between states will usually sustain an application by a receiver appointed by a court of one state for possession of the debtor's property in another state, where no rights of citizens of the latter jurisdiction will be thereby prejudiced. *Egan v. North American Loan Co.* 131.

PERMISSION TO SUE FOREIGN RECEIVER.

2. A receiver in another state, who is not actually or constructively in possession of certain real property in the state where a suit is brought to quiet title thereto, may be made a party to such suit without permission of the court in which he was appointed. *Egan v. North American Loan Co.* 132.

RECORDS.

EXECUTION OF CORPORATE DEED — SEAL.

The use by the recorder of deeds of the letters "L. S." is a sufficient representation of the seal of a corporate grantor in a recorded deed, and presumptively the corporate seal was on the original. *Altschul v. Cusey*, 182.

Question Presented by Record. See **APPEAL**, 13, 14.

REMEDY AT LAW.

Adequacy of the Test of Right to Cross Complaint. See **EQUITY**, 7, 8.

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Right of Court to Require a Remission of Part of Verdict in Personal Injury Case. See **NEW TRIAL**.

REMOVING CLOUD. Same as **QUIETING TITLE**.

REPLEVIN.

PROOF UNDER AN ALLEGATION OF OWNERSHIP.

1. In replevin for chattels in which plaintiff claims an interest under a mortgage, the conditions of which have been broken, proof of such facts may be made under an allegation of absolute ownership. *Culver v. Randle*, 491.

REPLEVIN AGAINST SHERIFF -- EFFECT OF APPLICATION OF THE PROPERTY TO PAYMENT OF THE CLAIM ASSERTED BY THE SHERIFF.

2. An officer seizing property under a writ can assert only the right to apply it to the payment of the claim on which the writ is based, and if that has been accomplished by another proceeding, the officer is not entitled to further possession. If he has been sued for it in replevin, he is entitled to only costs if he wins after the property has been so applied. *Culver v. Randle*, 491.

REPUTATION.

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RULES OF COURT.**AFFIRMANCE FOR FAILURE TO FILE BRIEF.**

A delay of three days in filing a brief, though unexplained, will not require an affirmance for failure to comply with the rule of court, where the appeal is evidently prosecuted in good faith. *Wood v. Fisk*, 276.

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SALES.**SPECIFIC PERFORMANCE OF CONTRACT.**

1. Sometimes an action for damages does not afford a sufficient remedy for a refusal to comply with a contract of purchase and sale, in which case equity will enforce the agreement according to its terms.

Livesley v. Johnston, 30; *Livesley v. Heise*, 148.

CONSTRUCTION OF CONTRACT.

2. The two contracts here stated are mutual and enforceable specifically.

Livesley v. Johnston, 30; *Livesley v. Heise*, 148.

SALESMEN.

Implied Power of Drummers to Sell Their Samples. See **PRIN. & AGENT**, 2.

SAMPLES of Traveling Salesmen.

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Not Recoverable Under General Allegations. See DAMAGES, 1.

SPECIFIC PERFORMANCE.

INSOLVENCY AS A REASON FOR SPECIFIC PERFORMANCE.

1. Insolvency of the vendor in a contract for the sale of chattels is not of itself a sufficient reason for decreeing a specific performance of such contract, though it may be a persuasive factor in deciding a court to act where it already has jurisdiction on other grounds. *Livesley v. Johnston*, 30.

CONTRACT TO SELL CHATTELS.

2. Though usually an action at law is an adequate remedy for the nonperformance of a contract to sell personalty, it may be otherwise, and that an award of damages will not afford the redress to which the injured party is entitled. Under such circumstances equity will decree a specific performance.

Livesley v. Johnston, 30.

ENFORCEABLE CONTRACT TO SELL CHATTELS.

3. A contract of sale and delivery, at a certain price, of crops to be grown in certain succeeding years — the buyer each year to advance for cultivating and picking purposes a sum exceeding half the agreed price, to become a lien on the crops — will be specifically enforced, to the extent that after the crops have been produced, and the buyer has contributed to the production, or has at all times been ready and willing to do so, delivery will be required; the venture being in a sense, a joint one, whereby the seller becomes, in a manner, a trustee, the buyer having at the making of the contract, as part consideration, surrendered the seller's note, and the seller being insolvent.

Livesley v. Johnston, 30; *Livesley v. Heise*, 148.

CONTRACT TO SELL CHATTELS — FRAUD BY VENDOR.

4. A fraudulent combination between one who has contracted to sell property not yet in existence, a crop to be grown, for example, and others, to avoid compliance with the contract, is ground for equitable relief by requiring specific performance.

Livesley v. Heise, 148.

CONTRACT TO CONVEY — DELAYED PAYMENT.

5. Specific performance of a sale of real estate will ordinarily be compelled, though the purchase price was not paid or tendered at the exact time fixed, when the party seeking performance has acted in good faith, and with reasonable diligence, unless there has been a change of circumstances affecting the equities of the parties.

Wright v. Astoria Company, 224.

ORAL PROMISE TO LEASE.

6. A tenant having entered into possession of certain premises under an unexpired lease to his vendor, and paid an extra price for the fixtures and made valuable improvements in reliance on the landlord's oral promise to give a written lease for a period exceeding one year, is not entitled to enforce the agreement in equity, since he did not enter under the agreement, or partly perform it, the landlord having refused to recognize his agreement before the expiration of the term of the vendor.

Dechenbach v. Rima, 500.

CONTRACT FOR PERSONAL SERVICES.

7. A contract requiring the rendition of personal services of an unusual and personal nature dependent on experience and judgment, will not ordinarily be specifically enforced, and, conversely, the other party will not be enjoined from terminating the contract, both parties being left to their actions for damages.

Harlow v. Oregonian Pub. Co. 520.

COMPLAINT IN SUIT TO COMPEL DELIVERY OF CROP.

8. The complaint in an action to compel delivery of crops under a contract by which defendant sold and agreed to deliver crops to be raised by him on land alleged in the contract to be owned by certain other persons, need not allege that defendant held the land under a lease, so as to give him a potential interest in the crop, the inference being that he had rented it. *Livesley v. Johnston*, 80.

IDEM.

9. The complaint in an action to compel delivery of crops under a contract by which defendant sold and agreed to deliver crops to be grown, they to be of choice quality and in first-class condition, need not allege that they were of the quality and in the condition agreed, as defendant cannot complain if plaintiff is willing to take them as of the stipulated quality and condition. *Livesley v. Johnston*, 80.

STALE DEMAND. See EQUITY, 11, 12.

STATE CONSTITUTION. Same as CONSTITUTION OF OREGON.

STATUTE OF FRAUDS.**PAROL LEASE.**

1. A parol agreement to lease real estate for more than a year is void under the statute of Oregon: B. & C. Comp. § 797, subds. 1 and 6.

Dechenbach v. Rima, 500.

IDEM.

2. A parol promise to lease certain real estate for a term of years, on which a party has relied in purchasing a stock of goods on the premises, is a mere promise as to future action with respect to a right to be acquired under an agreement not yet made and is void. *Dechenbach v. Rima*, 500.

TRUST EX MALEFICIO.

3. The enforcement of a trust arising *ex maleficio* is not dependent upon a memorandum, nor is it at all affected by the statute of frauds.

Kroll v. Obach, 459.

STATUTE OF LIMITATIONS. Same as LIMITATION OF ACTIONS.

STATUTES.**TITLE OF BARBER ACT OF 1903.**

The matter of licensing barber schools is so far germane to and connected with the title of an act entitled "An act to regulate the pursuit, business, art, and avocation of a barber, the licensing of persons to carry on such business, and to insure the better qualification of persons following such business," as to be valid: Const. Or. Art. IV, § 20. *State v. Briggs*, 386.

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STREET RAILWAYS.

INJURY TO PERSON NEAR TRACK.

1. Where a pedestrian approaching the track of a street railway company stops near it before crossing, the motorman in charge of an approaching car may rightfully assume that he intends to wait until the car has passed, and it is not negligence to release the brakes while the pedestrian is waiting.

Wolf v. City Railway Co. 446.

CONTRIBUTORY NEGLIGENCE — DUTY TO LOOK.

2. One who fails to look and listen for a car before crossing a track in a public street in daylight at a point where his view is unobstructed is guilty of contributory negligence.

Wolf v. City Railway Co. 446.

IDEM.

3. Under such circumstances the injured person cannot recover even though the car may have been running at a dangerous rate of speed, in which respect the company was negligent.

Wolf v. City Railway Co. 446.

IDEM.

4. One who in broad daylight stops beside a street car track till an approaching car is within a few feet of him, when he attempts to cross in front of it, is guilty of contributory negligence.

Wolf v. City Railway Co. 446.

STREETS.

Fixing Grades by Legislative Enactment. See MUNIC. CORP. 3.

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Example of Judgment Entered by Surprise. See **JUDGMENT**, 5.

TAXATION

TAX DEED — EFFECT OF STATUTE IN FORCE AT TIME OF SALE.

1. A tax deed is to be construed with reference to the statute in force when the tax sale was made, unless a subsequent statute has been made retrospective.

Blackburn v. Lewis, 422.

ASSESSMENT OF UNOCCUPIED LAND — STATUTES.

2. Hill's Ann. Laws, § 2735, provided that unoccupied land, if the owner was unknown, should be assessed as such without inserting the name of the owner; and Section 2775 declared that unoccupied land liable to taxation, when the owner was unknown, should be described, and the value thereof set down separate from other assessments, and the value thereof designated. *Held*, that the words "as such," in Section 2735, referred to unoccupied land, and not to unknown owner, and, that said sections, construed together, required that unoccupied land, if the owner was known, should be assessed in the usual way to the owner and under his name; but unoccupied land, if the owner was unknown, could not be assessed at all. An assessment of land to "unknown owner," without a further designation as unoccupied was void.

Blackburn v. Lewis, 422.

ESTOPPEL TO DENY VALIDITY OF TAX.

3. A grantee of land under a deed subject "to all unpaid taxes and sales for the same," is not thereby estopped to deny the validity of a previous tax sale, where the assessment on which the sale was based was wholly void.

Blackburn v. Lewis, 422.

EFFECT OF TAX-SALE PURCHASE BY COUNTY — SUBSEQUENT SALE.

4. Under the scheme of assessment and taxation existing in Oregon prior to 1901, by which only such interest in lands was assessed as the taxpayer had in the realty at the time of listing, and under Laws 1893, p. 28, authorizing counties, on sales of land for taxes, to bid the amount of taxes and costs, and declaring that, if no better bid was made, the land should be sold to and become the property of the county, subject to redemption as provided by law, the counties acquired a lien on the lands thus sold which was not affected by subsequent sales to other purchasers under later assessments. Later sales do not cut off rights acquired under prior sales.

Berger v. Multnomah County, 402.

TITLE CONVEYED BY TAX DEED UNDER SECTION 3127, B. & C. COMP.

5. A tax-sale purchaser receiving a tax deed under Section 3127, B. & C. Comp., which provides that tax deeds shall vest in the purchaser all the rights of the former owner, owners, lien holders, claimants, or other persons interested in the land, and also the rights and claims of the state and county, does not thereby, acquire the lien theretofore obtained by the county under purchases at tax sales, because the assessment made after the tax-sale purchases by the county was on such interest only as the owner had, and the legislature could not declare that the deed should convey a greater interest than was involved in the tax proceeding. Such a declaration would result in depriving property owners of the fee of their land without any process of law whatever.

Berger v. Multnomah County, 402.

TAX DEEDS

What Statute Controls Effect of. See **TAXATION**, 1.

Title Conveyed by. See **TAXATION**, 5.

TAXING COSTS.

Time for Filing Statement in Supreme Court. See COSTS, 1.

TELEGRAPHS.

RIGHT OF ACTION OF ADDRESSEE.

1. The addressee of a telegram may sue for damages caused by the failure to deliver it only when it is for his benefit and the telegraph company knows, or is chargeable with knowledge of, that fact. *Frazier v. Western Union Tel. Co.* 414.

NATURE OF BUSINESS OF TELEGRAPH COMPANY.

2. A telegraph company is a public service corporation and must, under penalty of damages, and with reasonable promptness, transmit and deliver messages to or for those for whose benefit they are sent. *Frazier v. Western Union Tel. Co.* 414.

EXTENT OF LIABILITY FOR DELAYED OR CHANGED TELEGRAMS.

3. The damages recoverable for delays in delivering telegrams, or for changes in cipher dispatches, are such as must have reasonably been expected to result from the breach of the contract, unless the company is informed of their nature or importance. *Frazier v. Western Union Tel. Co.* 414.

CASE UNDER CONSIDERATION.

4. A telegram addressed to a firm of real estate brokers: "See S. Take his last offer. Wire me at F."—does not show that it was for the benefit of the addressees, and hence, in the absence of any other notice to the telegraph company that such was the case, the addressees cannot sue for failure to deliver it. *Frazier v. Western Union Tel. Co.* 414.

TIMBER CULTURE ACT.

Difference in Devisability Between Lands Taken Under Homestead and Timber Culture Acts. See PUBLIC LANDS, 1.

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By Driving Sheep on Grazing Land. See ANIMALS.

Mitigating Damages by Showing Intrusion During Same Period by Other Persons. See DAMAGES, 4.

TRIAL.

WAIVING FILING OF MANDATE AFTER REVERSAL.

1. Though before a second trial either party may insist upon the entering of the mandate of the supreme court reversing a prior judgment, such action is not jurisdictional, and is waived if the retrial proceeds without the point being urged. *State v. Houghton*, 110.

EXCLUDING WITNESSES FROM THE COURTROOM.

2. An officer of a corporation who is not shown to have any special information rendering his presence important to the protection of its rights is within the meaning of Section 843, B. & C. Comp., authorizing the trial judge, upon the request of either party, to exclude from the courtroom witnesses not under examination. *Trotter v. Town of Slayton*, 301.

QUESTION FOR JURY — DISPUTED FACTS.

3. Plaintiff sold beets to defendant by the ton, the beets being weighed in car-load lots at defendant's factory on the railroad scales; and, a controversy arising as to the number of tons delivered, it was agreed, by way of settlement, that during the next season plaintiff should load specified cars in the same manner in which beets had been delivered before; that they should be weighed on corrected scales, and any difference in weight should be adjusted. *Held*, in an action for the price of beets delivered the first season, that it was a question for the jury whether a certain car furnished under the compromise agreement was intended by the parties to be used as a substitute for one of the cars specified in the agreement.

Oliver v. Oregon Sugar Co. 77.

IDEM.

4. Where the testimony is conflicting the question in dispute should be left to the jury.

Anderson v. Oregon Railroad Co. 211.

WHEN NEGLIGENCE IS QUESTION FOR JURY.

5. Where different inferences may reasonably be deduced from the testimony the question of negligence should be submitted; but not where only one inference can be reasonably deduced. In the latter instance it is the duty of the court to so declare, and the jury may be peremptorily instructed accordingly.

Wolf v. City Railway Co. 446.

IDEM.

6. Where there is no dispute as to the facts and the deduction therefrom is very clear, the court shall state to the jury whether the facts show either negligence or contributory negligence. *Massey v. Seller*, 267; *Wolf v. City Railway Co.* 446.

INSTRUCTIONS ON ABSTRACT PROPOSITIONS.

7. When there is no evidence of certain facts, an instruction that if the jury find such facts to exist they may draw certain inferences therefrom is abstract and misleading, constituting reversible error.

Anderson v. Oregon Railroad Co. 211.

INSTRUCTION ON ISSUES NOT MADE BY PLEADINGS.

8. In an action for personal injuries, an instruction is erroneous which permits a verdict for defendant, if the injury resulted from the negligence of a fellow-servant, where that defense is not pleaded. *Duff v. Willamette Steel Works*, 479.

INSTRUCTIONS MUST PRESENT RESPECTIVE THEORIES OF PARTIES.

9. A party who has offered evidence in support of the issues on his part is entitled to instructions that will present his theory of the case to the jury for consideration.

State v. Teller, 571.

INSTRUCTIONS IN THEIR RELATION TO THE EVIDENCE.

10. Instructions as to disputed facts are always to be considered and construed in connection with the testimony, and the words used may not always have just the same meaning: for instance, the word "point" as used in the instruction here considered does not mean the exact spot where the fire occurred, but rather means along that part of the road.

Anderson v. Oregon Railroad Co. 211.

INSTRUCTION AS TO EFFECT OF ORAL EVIDENCE.

11. Where, after charging on the general features of the case, the court gave the statutory injunctions touching the effect of evidence prescribed by B. & C Comp § 857, and in so doing charged that oral admissions and declarations of parties should be received with caution, "but that evidence of oral admissions and oral contracts, when proven declarations of parties, constitute very strong testimony," such instruction was not erroneous as in effect charging that evidence of oral contracts should be received with caution. *Thompson v. Purdy*, 197.

AMBIGUOUS INSTRUCTION.

12. An instruction that, if the instrument under which plaintiff claimed was intended as a mortgage, the jury should so find, was not fatally ambiguous by reason of the fact that it was impossible to say whether they were required to make a special finding, or whether they should find for plaintiff or defendant.

Culver v. Randle, 491.

REFUSING INSTRUCTIONS ALREADY GIVEN.

13. A charge specially requested may properly be refused when it has already been given elsewhere.

State v. Eggleston, 346; *Anderson v. Oregon Railroad Co.* 211.

TRIAL JUDGE.

Competency of to Testify in Case on Trial. See **WITNESSES**, 1.

TROVER.**TROVER BY TENANT AGAINST LANDLORD.**

1. Trover may be maintained by a tenant against his landlord for the seizure and conversion of chattels left upon his having been wrongfully evicted from the leased premises.

Eldridge v. Hoefer, 239.

LIMITATION IN TROVER ACTIONS.

2. Trover by a tenant whose landlord wrongfully evicted him and converted sundry of his chattels on the premises is barred only by the general statute of limitations.

Eldridge v. Hoefer, 239.

MEASURE OF DAMAGES WHERE ARTICLE HAS BEEN RETURNED.

3. The measure of damages in trover for conversion of an article which has been returned to and accepted by plaintiff, when special damages are not alleged, is the value of the property at the time of the conversion, with interest thereon to the trial, less its value when returned, with interest thereon from that date, and not the value of its use while in defendant's possession.

Eldridge v. Hoefer, 239.

MEASURE OF DAMAGES — INTEREST.

4. The measure of damages in an action of trover is the value of the property at the time of the conversion, with interest from such date, the interest being considered an item of damages.

Durham v. Commercial Nat. Bank, 385.

EFFECT OF STIPULATION.

5. In an action for conversion, being one of a series of similar cases, plaintiff's right to interest from the date of the conversion is not affected by a stipulation that the case in question shall await the outcome of a test case of the series whereupon judgment shall be entered accordingly, the effect of such agreement not being to fix the time when interest shall begin, but only the fact of conversion.

Durham v. Commercial Nat. Bank, 385.

CONVERSION — FACTS TO BE PROVED.

6. In an action for conversion of a share of a band of sheep, plaintiff claiming that defendant had had a number of sheep belonging to him, caring for them on shares, and that a settlement was had, determining the number of sheep belonging to plaintiff, and the lease extended for another year, during which time defendant converted the sheep, it was incumbent on plaintiff to prove either that at the time of settlement the testator had sheep belonging to plaintiff, or, if he had none, that others were selected and identified in some way in lieu of them.

Goltra v. Penland, 254.

TRUSTS.**CONSTRUCTION OF TERMS OF TRUST DEED.**

1. Where one is appointed trustee of real estate, the legal title of which is conveyed to him by the owner by an instrument limiting his power to convey to such persons only, and at the time and in the manner the *cestuis que trustent* may designate, the provision is for the benefit of the *cestuis que trustent*, and can be waived.

Allschul v. Casey, 182.

WAIVER OF LIMITATION IN TRUST DEED.

2. Where a trust deed is executed by the owners of real estate, who convey the title thereof to a trustee, limiting the power of the trustee to convey only to such persons and at the time and in the manner the *cestuis que trustent* may designate, the conduct of the *cestuis que trustent* conveying to one of their number, and that one and the trustee joining in a conveyance of the land to plaintiff, amounts to a waiver of the condition in the deed. *Allschul v. Casey*, 182.

TRUST EX MALEFICIO—STATUTE OF FRAUDS.

3. The enforcement of a trust arising *ex maleficio* is not dependent upon a memorandum, nor is it at all affected by the statute of frauds. *Kroll v. Coach*, 459.

EXAMPLE OF TRUST EX MALEFICIO.

4. A person having exclusive information relative to a proposed purchase, offering others an opportunity to take an interest and share the anticipated advantages on equal terms with him, is bound to act with entire truthfulness and good faith toward them in the matter, and if he derives a personal gain by deceiving them he is accountable as a trustee *ex maleficio*. *Kroll v. Coach*, 459.

EVIDENCE OF PURCHASE IN TRUST.

5. Evidence in a suit to have defendant declared a trustee for plaintiffs to the extent of a certain interest in land held sufficient to sustain a finding that plaintiffs were joint purchasers with defendant, under an option obtained by him, of said land, and not purchasers directly from him of an interest therein. *Kroll v. Coach*, 459.

WRITINGS NOT CONCLUSIVE BETWEEN PARTIES IN CASES OF FRAUD.

6. In a suit to compel restitution of property fraudulently withheld by an agent or trustee, a deed between the parties is not conclusive, it being part of the scheme by which the principal was deceived. *Kroll v. Coach*, 459.

UMATILLA INDIAN RESERVATION.

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Same as **CONSTITUTION OF THE UNITED STATES**.

UNITED STATES STATUTES. Same as **STATUTES OF THE UNITED STATES**.

USURY.**RIGHT TO CANCELLATION OF USURIOUS MORTGAGE.**

1. Where the payments made on an usurious loan, applied at the legal rate of interest, amount to the sum justly due, the borrower is entitled to have the payments properly applied and the debt and the mortgage securing it canceled.

Egan v. North American Loan Co. 131.

OBLIGATION OF ASSIGNEE OF LAND TO PAY USURIOUS MORTGAGE.

2. A grantee of real property subject to an usurious mortgage who did not assume the debt, but merely took the land subject to it, may plead usury against the mortgagee as to all payments that have been made.

Egan v. North American Loan Co. 131.

VENDOR AND PURCHASER.**TIME AS ESSENCE OF THE CONTRACT.**

1. Time of payment is not of the essence of a contract for the sale of real estate in equity, unless made so by express agreement of the parties, by the nature of the contract itself, or by the circumstances under which the contract was executed. *Wright v. Astoria Company*, 224.

EQUITABLE RIGHTS UNDER CONTRACT TO CONVEY LAND.

2. The execution of a contract to convey land creates between the parties certain equitable and reciprocal rights as to the title and the payment of the purchase price that can be adjusted only in equity.

Flanagan Estate v. Great Central Land Co. 335.

CONSTRUCTION OF CONTRACT BETWEEN VENDOR AND PURCHASER.

3. A contract of sale having provided that the vendee should pay a certain part of the purchase price on the day the contract was signed, and should within ten days thereafter deposit a further sum to the credit of the vendors, and should "within one year thereafter" make another payment, the word "thereafter" refers to the time of executing the contract, and not to the expiration of the ten days.

Flanagan Estate v. Great Central Land Co. 335.

TRANSFER NOT CONSTITUTING A BREACH OF CONTRACT TO CONVEY.

4. Plaintiff's vendors, as sole heirs to certain real property, entered into a written contract for the sale thereof to defendant, the consideration to be paid in several instalments at times provided in the contract. The contract provided that, when a certain sum had been paid, the vendors would execute a deed to be delivered to a trustee in escrow until the whole amount should be paid, which was done, but subsequently, and prior to another payment on the purchase price becoming due, the vendors formed a corporation and conveyed their interests to it, reciting however that the conveyance was made subject to the rights of the grantee in the escrow deed. *Held*, that such conveyance was not a breach of the contract to convey, since it did not carry even enough of a title to require a suit to declare the corporation a trustee, the grantee evidently taking in subordination to the rights of the vendee.

Flanagan Estate v. Great Central Land Co. 335.

RIGHT OF EQUITY TO DECREE STRICT FORECLOSURE.

5. A suit to obtain a strict foreclosure of a contract to convey land is inherently an admission of a subsisting right in the vendee and is not a claim of forfeiture, so that equity has jurisdiction.

Flanagan Estate v. Great Central Land Co. 335.

STRICT FORECLOSURE NOT AFFECTED BY STATUTE.

6. Section 423, B. & C. Comp., providing for the foreclosure of liens and the sale of the property subject thereto, does not affect the right to decree strict foreclosure of the rights of a vendee in a contract to convey land.

Flanagan Estate v. Great Central Land Co. 335.

STRICT FORECLOSURE — REASONABLE TIME FOR PAYMENT.

7. Parties seeking strict foreclosure must have done equity as a condition of asking it, and must therefore allow a reasonable time to make any delinquent payments.

Flanagan Estate v. Great Central Land Co. 335.

WHAT IS A REASONABLE TIME.

8. What will be a reasonable time within which defendant, in a strict foreclosure proceeding, shall make payments of the unpaid portion of the purchase price under a contract for the sale of land, rests mainly in the sound discretion of the court, time being allowed in proportion to the size of the debt.

Flanagan Estate v. Great Central Land Co. 335.

EXAMPLE OF RIGHT TO STRICT FORECLOSURE.

9. Where land was sold under a contract expressly showing the parties to have intended that the agreement should cease to be obligatory on the vendors when the vendee made default in payment of the purchase price, and it appeared that of the stipulated consideration of \$50,000, \$13,250 had been paid when a default occurred, leaving a balance due, after deducting interest, amounting to \$41,160, a strict foreclosure is not inequitable, though under such circumstances the time for making the final payment should be extended six months.

Flanagan Estate v. Great Central Land Co. 335.

IDEM.

10. A decree of strict foreclosure of a vendor's lien under a contract for the sale of land requiring the vendee to pay the balance due on the purchase price at a date when part of the consideration had not yet become due, or suffer foreclosure, should be modified by a reasonable enlargement of the time for payment.

Flanagan Estate v. Great Central Land Co. 335.

DEED REQUIRED TO COMPLY WITH CONTRACT TO SELL.

11. Where a firm contracted to convey real estate and both members of the firm died before completion of the contract, the vendee was entitled to a deed from the heirs of the deceased members of the firm, and was not obliged to accept a deed from any one else, as such a conveyance would not be a compliance with the contract.

Wollenberg v. Rose, 615.

MARKETABLE TITLE — PENDING SUITS.

12. A vendee who has contracted for the purchase of real property is ordinarily entitled to a marketable title, and one subject to suits to set aside some of the deeds conveying the land to the vendor is not marketable.

Wollenberg v. Rose, 615.

MARKETABLE TITLE — PARTIES NOT BEFORE THE COURT.

13. Upon considering whether a title is marketable a court cannot determine the rights of parties not represented, and declare the title marketable as against them.

Wollenberg v. Rose, 615.

TITLE SUBJECT TO LITIGATION NOT MARKETABLE.

14. A title that on the face of the record may have to be quieted by a decree is not marketable.

Wollenberg v. Rose, 615.

VENUE.

Instructions as to Proof of Should be Asked. See **CRIM. LAW**, 14.

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Of Requirements of Benefit Policy. See **INSURANCE**, 1.

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WATERS.**OBSTRUCTION OF RIVER — IRREPARABLE INJURY.**

1. Obstruction of a river, materially impeding the flow of its waters, and consequently the drainage from low lands along and near its course, materially retarding the planting of crops thereon, is an irreparable injury, authorizing equitable relief.

Krause v. Oregon Steel Co. 378.

OBSTRUCTING RIVER — QUANTUM OF PROOF.

2. In a suit to enjoin the obstruction of a river, whereby the drainage of adjoining lands is retarded, the plaintiff has the burden of proof only to the extent of establishing his case by a preponderance of the evidence.

Krause v. Oregon Steel Co. 378.

INJUNCTION AGAINST OBSTRUCTING RIVER—LACHES.

3. Defendant in a suit to enjoin obstructing a river with a dam impeding the drainage of lands, may not urge the objection of laches because the suit was not brought at an earlier date, it being in no worse position for maintaining its defense, and having been involved in no expense or inconvenience on account of the delay, and the injurious effects of the dam having been complained of from the time of its obstruction, and a concession of a partial abatement thereof having been obtained through the insistence, the suit being brought three years later.

Krause v. Oregon Steel Co. 378.

WITNESSES.

COMPETENCY OF TRIAL JUDGE.

1. Under B. & C. Comp. § 856, providing that the judge may be called as a witness by either party, a trial judge is a competent witness in a criminal case to testify that there was no inconsistency between the testimony of a witness at the trial in question and that given by him at a prior trial.

State v. Houghton, 110.

COMPETENCY OF DIVORCED WIFE AGAINST FORMER HUSBAND.

2. A final order of divorce entered for want of an answer operates to at once terminate the marriage relation, so that thereafter the woman is a competent witness against the man.

State v. Leasia, 410.

PROPER LIMITS OF CROSS-EXAMINATION.

3. In the development of matters brought out on direct examination, the practice is to permit such questions as tend to bring out the whole truth concerning them.

Thompson v. Purdy, 197.

IDEM.

4. Where defendant claimed to have made further advances to a corporation to an amount exceeding \$4,000 under an agreement that he should thereby be relieved from liability to contribute to the payment of certain notes, and plaintiff denied that such additional amount had been advanced, it was proper to permit the secretary and bookkeeper of the corporation, who was also a stockholder and member of its board of directors, to be asked on cross-examination concerning the manner in which the business of the corporation was transacted, he having previously explained without objection that sometimes the company had money and sometimes it had not, and that if it had no money in the bank, or not sufficient, and "if a farmer wanted to sell his wheat," defendant "backed it."

Thompson v. Purdy, 197.

IDEM.

5. Where, in an action for contribution between joint makers of a note for the benefit of a corporation, defendant relied on an agreement to release him from liability on his making further contributions to the corporation to the amount of \$4,000, and testified to such agreement, it was proper to permit him to be asked on cross-examination whether such agreement was to borrow money with which to complete the mill belonging to the corporation.

Thompson v. Purdy, 197.

IDEM.

6. Where, in an action against an executrix, her attorney, on direct examination, testified for plaintiff as to the presentation of the claim for allowance, it was not proper cross-examination to elicit testimony as to a conversation between said attorney and the decedent in which decedent had denied being indebted to plaintiff, as B. & C. Comp. § 849, permits cross examination only as to any matter stated in direct examination or connected therewith.

Goltra v. Penland, 254.

IMPEACHMENT—CONTRADICTING IMPEACHING WITNESS.

7. It is competent to show by persons who were present and heard that an impeaching witness is mistaken in saying that statements on a certain subject

made by the person impeached were different on a prior occasion from those made in court on the same subject. *State v. Houghton*, 110.

Excluding Witnesses From Courtroom. See TRIAL, 2.

Presumption of Continued Infirmary of Witness. See DEPOSITIONS, 3.

WORDS AND PHRASES.

"LEGAL COUNTY ROAD."

The term "legal county road" as used in Section 4781, B. & C. Comp., which imposes on counties a liability for injuries resulting from defects in such a road, does not include the streets of a city. *Schroeder v. Multnomah County*, 92.

"NEXT TERM."

The words "next term" in Section 155³, B. & C. Comp., providing that if a defendant whose trial has not been postponed on his application, or by his consent, be not brought "to trial at the next term of the court in which the indictment is triable, after it is found," the court must order the indictment dismissed, except for cause, do not include the current term at which the indictment was found. *State v. Breaw*, 586.

"POINT."

The word "point" as used in the instruction here considered does not mean the exact spot where the fire occurred, but rather means along that part of the road. *Anderson v. Oregon Railroad Co.* 211.

"TITLE OF THE CAUSE."

The expression "Title of the Cause," as used in Section 301 of B. & C. Comp. includes the names of the parties. *McDowell v. Parry*, 101, 102.

Ex. J. M.
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